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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,

Petitioner,

v.

THE CITY OF NEW YORK and STATE OF NEW YORK,

Respondents.

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,

Petitioner,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Whether the right of a trustee in Bankruptcy pursuant to Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a), to abandon property of the estate, which admittedly is burdensome to the estate and of inconsequential value to the state, can be restricted by a state as a result of prepetition conduct of the debtor.

2. Whether the decision of the Court of Appeals is inconsistent with this Court's decision in *NLRB* v *Bildisco and Bildisco,* 104 S. Ct. 1188 (1984), in relying upon an exception to the automatic stay contained in Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362, as a basis for judicially inserting an exception to the right of abandonment into Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a).

3. Whether the decision of the Court of Appeals is inconsistent with this Court's decision in *United States* v. *Security Industrial Bank,* 459 U.S. 70 (1982), in construing the Bankruptcy Code as requiring a trustee in bankruptcy to expend assets of the estate to effect an environmental cleanup of facilities operated by the debtor prior to the filing of the bankruptcy petition, which are of no value to the estate, thereby raising constitutional questions arising out of the "takings clause" of the Fifth Amendment.

4 Whether the decision of the Court of Appeals in denying a trustee in bankruptcy the right to abandon property of the estate pursuant to Section 554(a) of the Bankruptcy Code because of purported prepetition violations of state environmental laws is violative of the Supremacy Clause of the federal constitution.

5. Whether judicial imposition of conditions upon the right of a trustee in bankruptcy to abandon property of the estate pursuant to Section 554(a) of the Bankruptcy Code 11 U.S.C. Section 554(a) will impair bankruptcy policy and frustrate effectuation of the objectives of the federal Bankruptcy Code.

6. Whether "abandonment of property of the estate" by a trustee in bankruptcy pursuant to Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a), can constitute a violation of state or federal environmental laws and regulations.

7. Whether a state's claim for reimbursement of expenses for the environmental cleanup of property of the debtor is entitled to priority or administrative expense status in a bankruptcy liquidation.

Parties

The appellants in Third Circuit Case No. 83-5142 ("New York Case") were, the City of New York and the State of New York. Also involved in that case were the State of Pennsylvania, the Department of Environmental Resources for the State of Pennsylvania and the State of New Jersey, as *amici curiae*. The appellant in Third Circuit Case No. 83-5730 ("New Jersey Case") was the State of New Jersey, Department of Enviornmental Protection. Appellees were Thomas J. O'Neill, Trustee, in both cases, and Midlantic National Bank and James V. Frola and Albert VonDohlin in the New Jersey case. (Case No. 83-5730).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor, petitions for a Writ of Certiorari to review two judgments of the United States Court of Appeals for the Third Circuit in the following cases:

> In the Matter of: Quanta Resources, Corp., a corporation of the State of Delaware, Debtor, The City of New York and the State of New York v. Quanta Resources Corp., Debtor, Thomas J. O'Neill, Trustee (Case No. 83-5142); and,
>
> In re Quanta Resources Corp., Debtor, The New Jersey Department of Environmental Protection (Case No. 83-5730).

A single petition for writ of certiorari covering both cases is filed pursuant to Rule 19.4 of the Rules of the Supreme Court of the United States since the two cases involve identical or closely related questions.

Opinions Below

The opinions of the Court of Appeals for Case No. 83-5142 (App. A, *infra*, 1a to 34a)[1] and Case No. 83-5730 (App. B, *infra*, 35a to 40a) are reported at 739 F. 2d 913 and 927 respectively. The Memorandum Opinion of the District Court in *State of New York and the City of New York* v. *Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corp.* (App. G, *infra*, 52a to 60a) and the opinion of the Bankruptcy Court (App. K, *infra*, 69a to 75a) in the case *State of New York and City of New York* v. *Thomas J. O'Neill* are unreported.

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[1] Reference herein to the opinions and judgments below will be by citation to the appendix to this Petition for Certiorari filed by Thomas J. O'Neill, Trustee of Quanta Resources Corp.

Jurisdiction

The judgments of the Court of Appeals in Case No. 83-5154 (App. D, *infra*, 45a) and in Case No. 83-5730 (App. E, *infra*, 47a) were entered on July 20, 1984. On August 16, 1984 the Court of Appeals denied rehearing. (App. F, *infra*, 49a). The jurisdiction of this Court is involked under 28 U.S.C. Section 1254(1).

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the Supremacy Clause of Article VI and the "takings clause" of the Fifth Amendment. The provisions of the Bankruptcy Code involved are Sections 362, 554, and 704, 11 U.S.C. Sections 362, 554 and 704. The case also involves interpretation of 28 U.S.C. Section 959(b). These provisions are printed in the Appendix hereto.

Statement of the Case

These two companion cases, arising out of the same bankruptcy proceeding, present to the Court the question of construction of Section 554 of the Bankruptcy Code, *Abondonment of Property of the Estate,* and the interrelationship of this section with other state and federal laws. The question is presented in the context of the bankruptcy liquidation of a debtor which had engaged in the business of treatment of waste oils, and the attempt by the Trustee to abandon real and personal property of the estate which is alleged to have been contaminated through prepetition conduct of the debtor. The Trustee's abandonment is opposed by the respective environmental agencies of New York and New Jersey who seek to compel the Trustee to clean up the sites.

On October 6, 1981, Quanta Resources Corp. ("Quanta") filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Section 1101, *et seq.* On November 12, 1981, on motion of the debtor, the proceedings were converted to liquidation under Chapter 7, 11 U.S.C. Section 701, *et seq.* Petitioner, Thomas J. O'Neill, was appointed Trustee on November 18, 1981.

The debtor corporation operated facilities in Edgewater, New Jersey and Long Island City, New York. The New York property was owned by the debtor, while the New Jersey property was leased from two individuals, James Frola and Albert VonDohlin, appellees in the New Jersey Case.

New York

The property is located at 37-80 Review Avenue, Long Island City, New York. Upon his appointment, the Trustee obtained an appraisal report which described the property as follows:

> The subject property has been used for many years as a storage facility for waste oil and is improved with a wide variety of fuel storage tanks. We have been advised that many of these tanks now hold waste oil which is contaminated and effectively, the tanks have little or no market value. Also located on the site are several small concrete block buildings that were used in connection with this operation. In the judgment of the appraiser, the age and condition of these buildings are such that they have no value and should be removed.

The appraiser estimated the fair market value of the propertly as $535,000.00, but stated for "forced sale" purposes he would discount this value by 20% to $428,-

000.00. Mortgages on the property exceeded the "forced sale" value. These appraisal figures did not, however, consider any expenditures which would be necessary in order to dispose of the contaminated oil on the site and render the property marketable.

A considerable quantity of waste oil, sludge and other hazardous wastes, including oil contaminated with PCB's, was stored on the property, and it was estimated that the cost to dispose of the contaminated waste oil properly and otherwise clean up the site would be in excess of a million dollars.[2] While the single fact that the cost to dispose of the waste on the site would exceed the total value of the estate rendered the property valueless, at the onset of the case the Trustee was required to maintain 24 hour guard service because of the property's condition, at a cost in excess of $1,100.00 per week. At the initial hearing before the Bankruptcy Court on the application for abandonment, the Trustee testified that he personally had borrowed $20,000.00 since the inception of the Chapter 7 proceedings, and that much of this money had gone to continue the security. The Trustee simply had no funds whatsoever to pay for continued security, much less to undertake any cleanup operations.

On March 18, 1982, upon request of the Trustee, the Clerk of the Bankruptcy Court issued a notice to creditors of "sale by public auction or abandonment" of the New York property. The notice advised that if the Trustee did not receive an offer in excess of liens on the property, he would abandon the property. No offers were received at the auction sale on April 5, 1982.

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[2] According to New York's Brief before the Third Circuit, following the Trustee's abondonment, the City and State undertook a cleanup operation and expended 2.5 million dollars.

The Trustee subsequently received an offer from Greenpoint Oil Corp. ("Greenpoint"), to purchase the Long Island City property, subject to mortgages and certain other liens for a total price of $3,000.00. This offer was approved by the Bankruptcy Court. Counsel for Greenpoint subsequently advised the Trustee, however, that Greenpoint did not intend to proceed with the purchase because of hazardous conditions and violations existing at the property which Greenpoint was not aware of at the time of the offer. On June 22, 1982, on application of Greenpoint, the Bankruptcy Court voided the approval of the offer.

Although it was the position of the Trustee that, because of the prior notice to creditors the property should then be deemed to have been abandoned as of April 5, 1982, a new notice of proposed abandonment was mailed to all creditors on May 25, 1982. In reponse to the second notice to creditors, the State of New York filed an objection with the Bankruptcy Court on June 4, 1982. On June 7, 1982, the City of New York also filed an objection.

Oral argument on the objections was conducted before the Honorable D. Joseph DeVito, United States Bankruptcy Judge, on June 8, 1982. At that time, the Court directed the filing of additional briefs. On or about June 15, 1982 the State of New York filed a Memorandum in Opposition to Abandonment in which, for the first time, the State requested that the Court order that any money spent by the State or City to dispose of waste be deemed a first lien on the property with priority over any other mortgages and liens.[3] No notice of the application to impose a lien was given to the other lienholders on the property.

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[3] As of that date, no money had been expended by the City or State.

Following additional argument on June 22, 1982, the Bankruptcy Court authorized the Trustee to abandon the property. The utter futility of directing the Trustee to undertake a cleanup of the sites was recognized by Judge DeVito. He found that:

> The City and State are in a better position in every respect than either the trustee or debtors' creditors to do what needs to be done to protect the public against the dangers posed by the PCB contaminated facility . . . for this Court to grant the relief requested by the Attorney General would de little else than to put into play an exercise in futility, and would possibly delay the parties who could be chargeable with the cleanup of the property or who have other interests to permit them to move in. That should go forth as quickly as possible and I think this determination will work in that direction.

(App. K, *infra*, 73a to 74a). The claim to entitlement to a lien was rejected by the Court as unauthorized under the Bankruptcy Code. An Order incorporating the terms of the Court's oral decision was entered on July 7, 1982, effective June 22, 1982, *nunc pro tunc*. (App. J, *infra*, 66a to 68a).

Notices of Appeal to the District Court were filed on July 16, 1982. Oral argument was conducted before the Honorable Frederick B. Lacey, United States District Court Judge, on January 24, 1983. At that time, and in a Memorandum Opinion, (App. G, *infra*, 52a to 60a), Judge Lacey affirmed the decision of the Bankruptcy Court. The New York appeal was docketed in the Third Circuit on February 28, 1983.

New Jersey

In addition to the Long Island facility, Quanta operated a waste oil facility located at 1 River Road, Edgewater, New Jersey which consisted of storage and product tanks and equipment for the processing of oil. In June, 1981, a sampling of the waste oil at the site by the New Jersey Department of Environmental Protection ("NJDEP") determined that levels of PCB's were present in the oil in excess of the levels permitted under the temporary operating authorization issued in 1978. On July 2, 1981, Quanta agreed to cease its operations upon NJDEP's request. NJDEP further directed that certain remedial steps be undertaken by Quanta. The filing of the bankruptcy petition intervened.

For the Trustee to implement the remedial measures would have exhausted the entire estate. The Trustee simply did not and does not have resources adequate to maintain and protect the site much less implement remedial actions. Under such circumstances, the Trustee had no alternative but to seek authorization to abandon. Unlike New York, the debtor did not own the New Jersey real estate, and therefore the application for abandonment was limited to the oil in the tanks. An Order was entered by the Bankruptcy Court on May 20, 1983, authorizing the abandonment of the property effective May 17, 1983 *nunc pro tunc.* (App. I, *infra,* 64a to 65a).

Since the identical issue presented in the New Jersey case was already pending before the Court of Appeals, a notice of appeal by agreement to the Court of Appeals under 28 U.S.C. Section 1293(b) was filed on behalf of the New Jersey Department of Environmental Protection on September 21, 1983.

The New York case was argued before the Court of Appeals for the Third Circuit on October 24, 1983. No argument was heard in the New Jersey case. Opinions in both matters were filed July 20, 1984, reversing the decisions of the Bankruptcy and District Courts. The Trustee filed a Petition for Rehearing in both matters, and on August 16, 1984, rehearing was denied. (App. F, *infra,* 49a to 51a).

The Court of Appeals failed to recognize the realities in these cases. The administration of the debtors' estate is virtually completed. All assets other than those abandoned by the Trustee have been liquidated. Distribution was made to secured creditors at the time the assets securing their liens were sold, and administrative expenses incurred by the trustee, including but not limited to salaries and use and occupancy claims, have been paid to the extent funds were available. The Trustee has no money from which to finance any cleanup of either facility or to reimburse the government for its cleanup costs. Moreover, at no time did the trustee ever have sufficient assets to do so.

ARGUMENT

The decision of the Court of Appeals that allows governmental units, acting under state and local laws, to restrict the right of a bankruptcy trustee to abandon property pursuant to 11 U.S.C. Section 554(a) and require the trustee to expend and distribute the assets of the estate in a manner other than required under the Bankruptcy Code should be reviewed by this Court because this is an issue of profound importance to the administration of the federal bankruptcy laws which has not been, but should be, settled by the Supreme Court, and because the Court of Appeals decided a federal question in a way in conflict with applicable decisions of the Supreme Court.

A. The decision of the Court of Appeals is contrary to this Court's rule of construction announced in *NLRB* v. *Bildisco & Bildisco,* 104 S. Ct. 1188 (1984), in judicially inserting an exception into the Bankruptcy Code where no such exception was intended or included by Congress.

As one basis for conditioning the trustee's right to abandon, the Court of Appeals referred to the automatic stay provisions of Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362, which provide that "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" is not stayed by the filing of a bankruptcy petition. 11 U.S.C. Section 362(b) (4).

In *NLRB* v. *Bildisco & Bildisco,* 104 S. Ct. 1188 (1984), it was argued that collective bargaining agreements were not included within the general scope of Section 365(a) of the Bankruptcy Code, 11 U.S.C. Section 365(a), relating to executory contracts. Relying upon the fact that Section

1167 expressly exempted collective bargaining agreements subject to the Railway Labor Act, but granted no similar exception to agreements subject to the National Labor Relations Act, the Supreme Court stated:

> Obviously, Congress knew how to draft an exclusion for collective bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that Section 365(a) apply to all collective bargaining agreements covered by the NLRB.

Id. at 1195. Here too it must be assumed that Congress knew how to draft an exclusion for governmental actions when it wanted to do so, such as in the case of exception to the automatic stay pursuant to 11 U.S.C., Section 362(a). The failure of Congress to include such an exception in Section 554(a) indicates Congress' intent that the trustee's right to abandon pursuant to Section 554(a) not be subject to any exception for action by governmental units. As stated by District Court Judge Lacey in his opinion affirming the abandonment of the Long Island City facility, "reliance on Section 362 actually undercuts appellant's argument," (App. G, *infra,* 60a), there being no comparable exception for governmental actions contained in Section 554(a) of the Code.

B. The construction of Section 554(a) of the Bankruptcy Code advanced by the Court of Appeals is inconsistent with the decision of the Supreme Court in *United States* v. *Security Industrial Bank,* 459 U.S. 70 (1982), and is violative of the "takings clause" of the Fifth Amendment.

As pointed out by Judge Gibbons in his dissenting opinion in the Third Circuit, this Court in *United States* v. *Security Industrial Bank, supra,* held that:

> The Bankruptcy Act should not be construed to destroy the interest of creditors when a substantial question arises as to whether the act constitutes a taking of property without just compensation.

(App. A, *infra,* 28a). Quoting from *Security Industrial Bank,* Judge Gibbons stated that the holding was a corollary of the longstanding doctrine that the Court is obligated:

> First (to) ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided . . . similarly, in the absence of a clear expression of Congress intent . . . (a court should) decline to construe the Act in a manner which could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the "takings clause". (Citations omitted).

(App. A, *infra,* 28a)

The majority's construction of Section 554(c) of the Bankruptcy Code raises a substantial question under the "takings clause" of the Fifth Amendment, U.S. Const., Amend. 5,[4] since the requested cleanup of the properties

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[4] The dissenting opinion contained the following discussion on this point:

> The "taking" concern has been raised previously:
>
> [T]he public interest cannot demand the erosion of the bankrupt's assets to the point of confiscating practically the entire estate. At some point the extent and degree of taking runs into the constitutional prohibition in the Fifth Amendment [on] the taking of private property for public use without just compensation.

(Footnote continued on following page)

would completely exhaust the assets of the estate, both secured and unsecured. A construction of Section 554(a) of the Code is available, however, which would avoid this difficult constitutional question. Section 554(a) provides that:

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

11 U.S.C. Section 554(a). There is no question here but that the two facilities were burdensome to the estate and of inconsequential value to the estate.[5] Having satisfied this criteria, the plain language of Section 554(a) permits abandonment in both cases, thereby avoiding the constitutional question under the "takings clause" of the Fifth Amendment.

(Footnote continued from preceding page)

> In re New York, New Haven and Hartford Railroad Co., 330 F. Supp. 131 147 (D. Conn 197): see also H.R. Rep. No. 595, 95th Cong. 1st Sess. 423 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News, 5963, 6379:
>
> Subsection (a) [11] U.S.C. Section 1170(a) permits the court to authorize the abandonment of a railroad line if the abondonment is consistent with the public interest and either in the best interest of the estate or essential to the formulation of a plan . . . The authority to abandon or not to abandon lines of railroad is, of course, subject to the fifth amendment of the Constitution, which may in particular cases require abandonment in order not to erode a secured creditor's interest in the debtor's property even though the public interest dictates otherwise.

(App. A, *infra* 29a to 30a).

[5] The majority held that "this factual finding is not challenged on appeal." (App. A, *infra* 5a).

Under the holding of *United States* v. *Security Industrial Bank, supra,* the Court must read Section 554(a) in such a manner as to avoid the constitutional question. Accordingly, Section 554(a) must be read as permitting abandonment under the facts of this case. This Court should grant this petition for certiorari in order to insure conformity with the *Security Industrial Bank* decision.

C. 28 U.S.C. Section 959(b) does not constitute a bar to abandonment by the Trustee.

Following a lengthy analysis of the provisions of 28 U.S.C. Section 959(b), the Court of Appeals admitted that Section 959(b) was "not itself an independent prohibition of the trustee's abandoning property in contravention of state law . . .", and that the scope of the section could be construed as limited to administration of the debtor's business as a going concern (App. A, *infra,* 17a). The Court further cited the interpretation of Section 959(b) found in Moore's:

> But Section 959(b) applies *only to the receiver in his operation of the property in his possession.* It does not require the federal receivership court to comply with state laws regulating the distribution of funds in receivership, although Erie R. Co. v. Tompkins should now require it to do so in cases involving only non-federal matters. (emphasis added)

7-pt 2 Moore's Federal Practice, 66.04[4] at 1913 (J. Moore & J. Lucas 2d ed. 1982) (footnotes omitted). Since Section 959(b) is not an independent bar to abandonment, can reasonably be construed as limited in scope to an ongoing business, and since the only cited authorities support this limitation, it is respectfully submitted that 28 U.S.C. Section 959(b) does not prohibit abandonment by the trustee in this case.

D. Abandonment of property of the estate by a Trustee in Bankruptcy in accordance with 11 U.S.C. Section 554(a) does not violate state laws or regulations.

The Court of Appeals made a fundamental mistake in its statement of the issue presented on appeal. The majority opinion in Case No. 83-5142 states the issue as:

> Does 11 U.S.C. Section 554 (1982) permit the abandonment of property of the bankrupt estate in contravention of state and local environmental protection laws?

(App. A, *infra,* 3a). Again in Case No. 83-5730, involving the New Jersey site the court held that:

> The trustee does not have the right to abandon property of the estate where abandonment contravenes state public health and safety laws, as it does here.

(App. B, *infra,* 39a). In each case, the majority made an assumption, not supported by fact or law, that abandonment by the Trustee would violate state law.

The issue should be stated as whether governmental units, acting under state and local laws, can restrict the right of a trustee to abandon property pursuant to the federal Bankruptcy Code and require that the trustee expend and distribute the assets of the estate in a manner other than that required under the Bankruptcy Code. It is respectfully submitted that this is a question of vital importance in the administration of the Bankruptcy Code which should be settled by this Court.

The history and purpose of abandonment under the prior Bankruptcy Act and the present Bankruptcy Code indicate that the right has evolved from a "judge made rule" to a congressionally recognized power under the Bankruptcy Reform Act of 1978.[6] Discussing the background and legislative history of a trustee's right to abandon property of the estate, Collier states that:

> No provision, however, specifically dealt with the abandonment of burdensome property in liquidation cases. By analogy to the trustee's power to reject executory contracts, cases under prior law permitted the trustee to abandon property that was either worthless or overburdened, or for any other reason when it was certain that the property would not yield any benefit to the general estate. This practice furthered the *paramount purpose of bankruptcy liquidation*: *the reduction of the debtor's property to money as expeditiously as practicable so as to secure funds for distribution to general creditors. Forcing a trustee to retain and administer property that was valueless or unprofitable is contrary to that purpose.* (emphasis added)

4 Collier on Bankruptcy, Section 554.01 (15th Ed.) Collier goes on to state that:

> Former section 70a of the Act vested title to the debtor's property in the trustee. Abandonment then divested the trustee of this title and revested it in the debtor. Under Section 541, the Trustee no longer takes title to the debtor's property, and, upon abandonment under Section 554, the trustee is simply divested of control of the property because it is no longer part of the estate. Thus, abandonment constitutes a divesture of all interests in the property that were property of the estate.

4 Collier on Bankruptcy, Section 554.02 (2) (15th Ed.)

[6] As such, decisions under the prior Bankruptcy Act relied upon by the Court of Appeals are not persuasive authority. See *Ottenheimer* v. *Whitaker,* 198 F. 2d 289 (4th Cir. 1952), affirming 102 F. Supp. 913 (D. Md. 1952), and *In re Lewis Jones,* 1 B.C.D. 277 (Bk. Ct. E.D. Pa. 1974).

When a trustee abandons property, the property stands as if no bankruptcy had been filed. The property reverts back to the debtor as of the date of the commencement of the proceedings. In effect, the debtor is treated as having owned it continuously. *Mason* v. *CIR,* 646 F. 2d 1309 (9th Cir. 1980). Liens encumbering property abandoned by the trustee are not affected, and the debtor holds in the same manner as prior to the filing of the bankruptcy. *In re Tarpley,* 4 BR 1945 (Bktcy Ct. Tenn. 1980). The Trustee is deemed to have never had title to or custody of the property.

Upon abandonment, the trustee here stands as if he never had an interest in either facility. He has neither taken any action nor refrained from taking any action that would subject him to liability under state or local laws. To suggest that the trustee could be personally exposed to criminal sanctions solely by virtue of his appointment by a federal court to serve as a trustee in bankruptcy is proof of how the objectives of the Bankruptcy Code will be frustrated by the Court of Appeals' decision.

It would be a different matter, of course, if the trustee had actually operated the property in his possession, which post-petition operation resulted in violations of environmental laws. Here, however, the trustee did not operate either facility. To equate the trustee's sole act

of taking custody of the property between the date of his appointment and the date of the abandonment to a disposal of hazardous wastes in violation of federal, state and local environmental laws quite obviously is a strained interpretation of the concept of abandonment. There being no violation of law on the part of the trustee, the trustee cannot be denied the right to abandon assets of the estate based upon these laws. For the trustee not to abandon this property would be violative of his duties enumerated in 11 U.S.C. Section 704. The trustee's duty to abandon unprofitable property is also stressed in *In re Harper,* 175 F. 412 (N.D.N.Y. 1910); *In re Zehner,* 193 F. 787 (A. D. La. 1912); *In re Watts,* 19 F.2d 526 (E.D. La. 1927); and *Bowman* v. *Towery,* 207 Okla. 4, 248 P. 2d 1030 (1952).

E. The decision of the Court of Appeals will frustrate effectuation of the objectives of federal bankruptcy legislation.

How are claims of state and local governmental for environmental cleanup costs to be treated in liquidation proceedings under the Bankruptcy Code? It is respectfully submitted that the decision of the Court of Appeals on this question is contrary to several provisions of the Bankruptcy Code and will effectively render bankruptcy administration in the circumstances of this case impossible.

1. Courts cannot create categories of priorities or administrative expenses not recognized by the Bankruptcy Code.

Courts have consistently held that the original and primary purpose of bankruptcy legislation is the reduction of the debtors' property to money as expeditiously as

practical, and a fair and equitable distribution of the property of the debtor to and among his creditors. States, by means of their own laws, cannot devise preferences among creditors of the debtor which the federal bankruptcy law does not recognize. *In re Universal Money Order Co.,* 470 F. Supp. 869 (S.D. N.Y. 1977); *In re Good Deal Supermarkets, Inc.,* 384 F. Supp. 87 (D. N.J. 1974).

The governmental authorities in these cases are seeking to compel the trustee to retain and administer property which is valueless and unprofitable, and to expend assets, which would otherwise be available for distribution to creditors, to maintain the property and dispose of the hazardous wastes located on the sites. In effect, the states are attempting to obtain a preference of one class of creditors over another, contrary to the express provisions and purposes of the Bankruptcy Code. Under such circumstances, the Supremacy Clause of Article VI of the Constitution demands that the conflict between the Bankruptcy Code and state legislation be resolved in favor of the Bankruptcy Code. Abandonment must be permitted.

Although the Court of Appeals recognized that "state law regulating the distribution of assets among creditors must give way to the all encompassing law of creditors' rights", (App. A, *infra,* 18a) the Court failed to recognize that, in effect, the denial of the trustee's right to abandon will result in a distribution of assets among creditors pursuant to state law rather than federal law. This result clearly is wrong, and frustrates the full effectuation of the objectives of federal bankruptcy legislation.

For the Court to say that the trustee must finance the cleanup would require a rearrangement of the priority of distribution not envisioned by the Bankruptcy Code. Secured and unsecured creditors would be required to pay for the cleanup of the facilities. The result would be to

transfer the cost to parties who were in no way responsible for placing the contaminated oil on the sites. If the Court insists that the cost of cleanup be borne by the innocent, then it is the innocent public who should carry that burden not a select innocent few. As noted by Judge Gibbons, one result is:

> Transferring the cost of cleanup to secured and unsecured creditors of the debtor, in this instance outside New York, who have no interest whatever in the Long Island City property, and who, on the record before us, were in no way responsible for placing the contaminated oil on that site.

(App. A, *infra,* 29a).

The question of the right of governmental units to priority or administrative expense status was addressed by Congress in connection with the enactment of the exception to the automatic stay provisions. 11 U.S.C. Section 362. The Congressional House Report Comments on Section 362 include the following:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.
>
> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but *does not extend to permit enforcement of a money judgment.* Since the assets of the

> debtor are in the possession and control of the bankruptcy court and since they constitute a fund out of which all creditors are entitled to share, *enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.*

H.R. Rep. No. 595, 95th Cong. First Sess. 343 (1977), reprinted, in (1978), U.S. Code Cong. & Ad. News 5963, 6299. The intent to deny priority or preferential treatment is clear.

As pointed out in the decision in *In re Charles George Land Reclamation Trust,* 30 B.R. 918 (Bkrptcy Ct. D. Ma. 1983), Congress had an additional opportunity to consider the question of the priority of federal and state governmental claims for cost of cleaning up hazardous substances. A bill introduced by Rep. Florio on September 23, 1982 (H.R. 1972) would have given priority to such claims. The bill was defeated. The fact that it was necessary to introduce such a bill also indicates that such priority is not accorded to these claims under the present bankruptcy code.

Upon the failure of a landowner to implement cleanup measurers, both the New York and the New Jersey Statutes relied upon by respondents below are similar in result. If the state undertakes cleanup of the property and disposes of the hazardous waste, the state then becomes entitled to a lien.[7] By way of example, the New

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[7] The City of New York filed a Proof of Claim on October 7, 1982, in the sum of "approximately $5,000,000.00". The City claimed a lien pursuant to New York City Administrative Code Section 564.245 upon the Long Island City premises "for all expenses incurred by the City of New York in securing, removing and properly disposing the materials unlawfully placed there by the debtor."

(Footnote continued on following page)

Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq.* creates:

> A first priority claim and lien paramount to all other claims and liens upon the revenues and all real and personal property of the discharger, whether or not the discharger is insolvent."

N.J.S.A. 58:10-23.11f. The claim and liens arise upon any expenditure by the administrator of the New Jersey Spill Compensation Fund.

In this case, the City and State of New York, upon abandonment by the Trustee, received exactly what they claim they are entitled to, a lien on the New York property of the debtor. New Jersey, not yet having made any expenditures, is not entitled to a lien. If and when New Jersey does expend money, it will be free to pursue its remedies against the real property in Edgewater, New Jersey. Since no expenditures were made by any governmental units prior to the filing of the bankruptcy petition, the asserted liens were not perfected or enforceable on the date of the filing, and are therefore avoidable by the Trustee. 11 U.S.C. Section 545.

(Footnote continued from preceding page)

The New York State Department of Environmental Conservation filed a Proof of Claim on July 14, 1982 in an amount "to be determined". The claim states that the cost of removal and disposal of waste oil and other hazardous substances constitutes its claim. New York State also claimed a first lien on the Long Island City property.

The proof of Claim of the New Jersey Department of Environmental Protection, filed July 20, 1982, asserts that it is a "claim for an administrative expense of the estate which should be given priority over all secured claims of the estate". New Jersey further claimed "that all money received by the Trustee from the sale of oil or equipment at the facility in Edgewater should be applied toward the proper closure and cleanup of the facility".

New York and New Jersey further appear to seek a "super-priority" status for their claims such as that contemplated by 11 U.S.C. Section 364(c). Nowhere in the Bankruptcy Code can there be found an express or implied intent to accord such status to any claims other than those expressly set forth in the Code.

As to whether the claims of New York and New Jersey could be accorded administrative expense status under 11 U.S.C. Section 503(b)(1)(A), Judge Gibbons, in his dissenting opinion, characterized as "preposterous" the contention that the cleanup costs for assets which are of no value to the estate could be classified as "necessary costs and expenses of preserving the estate." 11 U.S.C. Section 503(b)(1)(A). While, as noted by the majority, the categories enumerated in Section 503 are not exclusive, it is clear that all categories relate to preservation of the estate. In no way will a cleanup of the properties benefit or preserve the estate. The only result can be the exhaustion of all assets of the estate, and the denial to all other creditors of the right to share in the distribution of the estate.

2. There exists no basis for subordination of administrative, secured, and other unsecured claims to the claims of New York and New Jersey.

What the state and local governmental units effectively seek here is a subordination of all other claims, whether secured, super-priority, administrative or unsecured, to their claims. New York seeks reimbursement of the $2.5 million it expended subsequent to the trustee's abandonment of the Long Island City site. New Jersey, not having spent any money, seeks to compel the Trustee to undertake removal of hazardous materials from the Edgewater, New Jersey site. In any event, the states want these claims

to be paid first. New York in seeking to reach assets of the debtor located in New Jersey, actually seeks more than its own statute permits.

Under Section 510 of the Bankruptcy Court, 11 U.S.C. Section 510, courts have jurisdiction to subordinate, on equitable grounds, all or any part of an allowed claim or interest to all or any part of another allowed claim or interest. The Code provides:

> Section 510. Subordination
>
> . . .
>
> (c) Notwithstanding subsection (a) and (b) of this section, after notice and a hearing, the court may—
>
> (1) under priniciples of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; . . .

Before the Bankruptcy Court will exercise its power of equitable subordination, however, three conditions must be satisfied:

(1) The claimant must have been engaged in some type of inequitable conduct;

(2) The misconduct must have resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant, and

(3) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

Matter of Mobil Steel Company, 563 F. 2d 692, 700 (5th Cir. 1977); *In re American Lumber Company,* 5 B.R. 470 (D.C. Minn. 1980). The fundamental aim of subordination

is to undo or to offset any inequity in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of the bankruptcy result. *In re Kansas City Journal-Post Co.,* 144 F. 2d 791 (8th Cir. 1944); *In re Westgate-California Corp.,* 642 F. 2d 1174 (9th Cir. 1981). Generally, the claim will not be subordinated unless it is shown that the claimant has acted inequitably in the course of his relationship with the debtor and that those activities have harmed the debtor or his other creditors in some way. *In re Ahlswede,* 516 F. 2d 784, 788 (9th Cir. 1971); *In re Westgate-California, supra.*

Included in the legislative history to Section 510 is the following:

> It is intended that the term "principles of equitable subordination" follow existing case law and leave to the courts development of this principle. To date, under existing law, a claim is generally subordinated only if holder of such claim is guilty of inequitable conduct, or the claim itself is of a status susceptible to subordination, such as a penalty or a claim for damages arising from the purchase or sale of a security of the debtor. The fact that such a claim may be secured is of no consequence to the issue of subordination. However, it is inconceivable that the status of a claim as a secured claim could ever be grounds for justifying equitable subordination. 124 Cong. Rec. H 11,095 (Sept. 28, 1978); S 17,412 (Oct. 6, 1978).

There is no basis for the subordination sought by respondents. There has been no allegation, and there exists no basis for any allegation, that the Trustee or any other creditor engaged in any inequitable conduct or misconduct which harmed the debtor or respondents. There is no basis in the Bankruptcy Code or case law for subordination of any claims of New York and New Jersey.

3. Under the circumstances of this case, a Trustee in Bankruptcy has no alternative but to refuse appointment or, once having accepted appointment, to resign.

Where is a trustee in bankruptcy left under the decision of the Court of Appeals? Does he remain the owner of the property forever? Which site must be cleaned first—New York or New Jersey? Can he be subject to criminal sanctions or personal liability for costs of cleanup? Can the estate never be closed? Can creditors be charged with the cost of cleanup? These and many other important questions are left unanswered.

A good example of the frustration of the purposes of federal bankruptcy law which will result is found in the case of *In re Charles George Land Reclamation Trust,* 30 B.R. 918 (Bkrtcy. D.Ma. 1983). The debtor in that case owned and operated a waste disposal facility. Prior to the filing of a bankruptcy petition, the debtor had entered into a consent judgment with the Commonwealth of Massachusetts requiring the debtor to undertake certain actions to bring the facility into compliance with environmental laws and regulations. The required remedial actions had not been completed as of the filing of the bankruptcy petition. The Commonwealth of Massachusetts argued before the Bankruptcy Court that any trustee would have to immediately rectify the violations of law or otherwise find himself in violation of 28 U.S.C. Section 959(b). As a result, no private panel member would agree to serve as trustee. The United States Trustee, as a default trustee under 11 U.S.C. Section 15701(b), then brought an emergency motion for dismissal. This motion was granted. The present uncertain status of the law in this area, which resulted in the refusal of anyone to serve as trustee, was the reason.

To allow the decision of the Court of Appeals to stand would effectively preclude orderly liquidation of any debtor's estate where the debtor was under an obligation at the time of filing bankruptcy proceedings to take any remedial action under any other federal or state legislation. Nowhere in the Bankruptcy Code can there be found a legislative intent to deny such debtors the rights and protections under the Bankruptcy Code. Quite to the contrary, the Code evidences a congressional intent that claims of governmental units for environmental cleanup not be accorded priority or administrative expense status, but rather share with all other creditors in the distribution of the estate.

F. This court should grant certiorari.

We believe that there are special and important reasons for this Court to grant review on writ of certiorari. We have attempted to illustrate as concisely as possible how extensively the decision of the Court of Appeals will frustrate the objectives of bankruptcy. The uncertainty in bankruptcy law today due to the absence of a definitive answer on this issue from the Supreme Court has made administration of estates of debtors involved in any way with hazardous materials at the very least difficult and dangerous for trustees, if not impossible. The complete reordering of priorities which can result from the decision of the Court of Appeals should be reviewed and settled by this Court. This Court should also review the decisions in light of the apparent inconsistencies with applicable decisions of the Supreme Court.

CONCLUSION

Based upon the foregoing it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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Dated: November 14, 1984

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit (No. 83-5142)

No. 83-5142

In the Matter of:
QUANTA RESOURCES CORP.,
a corporation of the State of Delaware

Debtor

THE CITY OF NEW YORK and
THE STATE OF NEW YORK

v.

QUANTA RESOURCES CORP.,
a corporation of the State of Delaware

State of New York
and City of New York

Appellants

On Appeal from the United States
District Court for the
District of New Jersey
(Civil Action No. 82-3524)

Argued October 24, 1983

Before: GIBBONS, GARTH, and
HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed July 20, 1984)

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

This case presents an issue of major importance under the Bankruptcy Reform Act of 1978: does 11 U.S.C. § 554 (1982) permit the abandonment of property of the bankrupt estate in contravention of state and local environmental protection laws? In proceedings before the bankruptcy court, the trustee in bankruptcy here asserted the power to abandon a waste oil processing and storage facility. He was opposed by the State and City of New York, who argued that the trustee's power was limited by state and local laws regulating the abandonment of hazardous wastes. The bankruptcy court granted permission to abandon. The district court affirmed the bankruptcy court. We reverse.

I

Quanta Resources Corp. (Quanta), which owned and operated a waste oil storage and processing facility in Long Island City, New York (the geographic center of New York City), filed a voluntary petition in bankruptcy under Chapter 11 of the Act on October 6, 1981. The action was converted to a liquidation proceeding under Chapter 7 on November 12, 1981. Thomas J. O'Neill (Trustee), the appellee here, was appointed trustee in bankruptcy on November 18, 1981.

The Trustee filed a notice of intention to abandon

the facility under 11 U.S.C. § 554. That section provides that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate, or that is of inconsequential value to the estate." At the time of the notice there were on the site fuel storage tanks containing more than 500,000 gallons of waste oil and other chemicals, of which at least 70,000 gallons were contaminated with polychlorinated biphenyls (PCB's).

PCB's are extremely hazardous chemicals.[1] Reflecting the hazards associated with these compounds, numerous federal, state, and local laws govern the storage and disposal of PCB's. *E.g.*, 15 U.S.C. § 2605(e) (1982); 40 C.F.R. §§ 761.1-761.80 (1983); N.Y. Envtl. Conserv. Law §§ 27-0900 to 27-0923 (McKinney Supp. 1982); N.Y. Admin. Code Tit. 6, § 366.4(e) (1982); New York, N.Y. Admin. Code § C19-50.0. Compliance with these laws would have required substantial expenditures to guard, repair, and clean up the facility and to dispose of the waste.[2] The Trustee's notice of intention to abandon was predicated on the assertions that the requisite expenditures would render the property a burden on

1. PCB's are themselves toxic. *See generally* Nat'l. Rsch. Council Comm'ee on the Assessment of Polychlorinated Biphenyls in the Environment, Polychlorinated Biphenyls (1979). Their oxidation products (produced upon burning PCB's) are also toxic. Among the oxidation products of PCB's are polychlorinated dibenzo-p-dioxins (the so-called "dioxins") and polychlorinated dibenzo forans, which are powerful carcinogens, teratogens, and liver toxins. Affidavit of Dan Levy, New York State Department of Law Environmental Scientist, App. 19 - 22.

2. At the time of the hearing, Quanta was evidently in violation of a consent order requiring it to bring the facility into compliance with state law. *See* Transcript of Bankruptcy Proceedings, June 8, 1982, at 25.

the estate, and that the property would be of inconsequential or no value to the estate.

At the time of proposed abandonment, the site was subject to two mortgage liens.[3] Although there were objections filed to abandonment, there was no dispute as to the fact that the requisite expenditures would rapidly dissipate whatever equity there was in the property. Thus, the bankruptcy court found that the property was burdensome and of inconsequential or no value to the estate.[4]

The objections to abandonment filed by New York asserted that abandonment of the property would itself violate state and local law. This is because "abandonment" under Section 554 revests title subject to liens in Quanta,[5] which has no other assets, having lost title to these in favor of the estate upon commencement of the bankruptcy case. 11 U.S.C. §541 (1982). Quanta was itself, then, unable to act

3. On March 18, 1982, the Trustee had filed a notice of intended "sale by public auction as abandonment" of the site. The notice stated that if the Trustee did not receive an offer in excess of a lien of the Equitable Life Assurance Society, the property would be abandoned. Objection to the sale was filed by Portland Holding Corp. based on an asserted mortgage lien; the bankruptcy court entered judgment establishing the validity of that lien. An offer to purchase the property subject to the liens was approved by the court, but was subsequently withdrawn on the ground that there were hazardous wastes stored there in violation of law, and that this had not been made known to the purchaser. *See* Transcript of Bankruptcy Court Proceedings, June 8, 1982, at 12. These liens were later abandoned. *See* Affidavit of Nancy Stearns, annex; Affidavit of Carol Moore, Exh. B.

4. This factual finding is not challenged on appeal.

5. Abandonment is to any person with a possessory interest in the property, including the debtor. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 93 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5879.

with respect to the site. Thus abandonment would, in effect, constitute disposal of the hazardous wastes, *see* N.Y. Envtl. Conserv. Law § 71-7702 (McKinney Supp. 1982) ("disposal"). In addition, abandonment of the facility in its then state of disrepair, itself irremediable by Quanta, would create a continuing violation of state and local hazardous waste storage laws, *see supra*.

New York asserted, therefore, that because these laws are designed to decrease the risk of uncontrolled toxic chemical discharge, abandonment would create a substantial danger to the public health and safety. Thus New York requested that permission to abandon be denied until all hazardous wastes were removed from the property and lawfully disposed of. New York grounded its objection in both "public policy considerations" reflected in the applicable local laws and the provisions of 28 U.S.C. § 959(b) (1982), which requires that a trustee "manage and operate its property in his possession as such trustee. . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof."

After a hearing, the bankruptcy court rejected New York's objections and issued an order, on July 7, 1982, permitting abandonment. The court refused to stay the order pending appeal, and refused to grant New York a first lien on the property to the extent of any monies that New York might expend to bring the abandoned property into compliance with law. In fact, following the abandonment New York did proceed to clean up the facility,[6] with the exception of contaminated subsoil, at a cost of about $2.5 million (Affidavit of Richard Mendes).

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6. *See* N.Y. Envtl. Conserv. Law § 27-0916 (McKinney Supp. 1982).

New York appealed to the district court from the bankruptcy court's order, without raising the question of New York's right to a first lien. The district court affirmed on January 24, 1983. New York appealed to this court. The Commonwealth of Pennsylvania and the State of New Jersey submitted briefs as *amici curiae*. The questions raised by New York in this appeal are the propriety vel non of abandonment, and New York's right to reimbursement for its cleanup costs as an administrative expense, *see* 11 U.S.C. §§ 503(b), 507(a).

II.

Where it is contended, as it is here, that federal law confers a power that is not limitable by state law, the supremacy clause, U.S. Const. Art. VI, cl. 2, requires that we determine whether application of the state law frustrates the full effectuation of the objectives of federal bankruptcy legislation. *Perez v. Campbell*, 402 U.S. 637, 652 (1971). In general, preemption of state law "is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Consolidated Edison v. Montana*, 453 U.S. 609, 634 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)); *see Penn Terra Ltd. v. Department of Envtl. Resources*, No. 83-5448, slip op. at 11 (3d Cir. April 30, 1984). *See also Stellwagen v. Clum*, 245 U.S. 605, 613 (1918) (state laws are suspended only to the extent of actual conflict with the scheme of federal regulation). Thus, analysis must proceed in two stages: first, an examination of the primary purposes of each of the laws at issue; second, a determination whether state law is an obstacle to the effectuation of federal objectives. *Perez, supra*, 402 U.S. at 644, 649.

The objectives of federal bankruptcy law can be broadly stated: to provide for an equitable settling of creditors' accounts by usurping from the debtor his power to control the distribution of his assets.[7] *See Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930). The purpose of a liquidation proceeding under Chapter 7, as under Chapter VII of the Bankruptcy Code, *see* S. Rep. No. 989, 95th Cong. 2d Sess. 6, reprinted in 1978 U.S. Code Cong & Ad. News 5792 (new law essentially tracks previous law), is to provide a fair distribution of the debtor's assets among the creditors; to that end, a trustee for the creditors is appointed by the court or elected by the creditors. 11 U.S.C. §§ 702 (election), 703 (appointment), 704 (duties). The trustee must collect the debtor's assets for the estate, reduce the assets to money, and distribute the property of the estate. *Id.* §§ 704, 726. The abandonment power embodied in Section 554 enables the trustee to rid the estate of burdensome or worthless assets, and so speeds the administration of the estate, *see id.* § 704(1), and also protects the estate from diminution. In such manner, abandonment serves the creditors' interest in expeditiously obtaining a fair amount on settlement of their claims.

The primary purpose of the state and local laws regulating disposal of hazardous wastes is obviously to protect the public from the toxic effect of dangerous

7. While it has been held that the old bankruptcy law advanced a second purpose, to provide a fresh start for the debtor, *e.g.*, *Kokoszka v. Belford*, 417 U.S. 642, 645-46 (1974) (citing *Berlingham v. Crouse*, 228 U.S. 459, 473 (1913)), that purpose can no longer be said to be advanced in present liquidation law, with respect to nonindividuals (*i.e.*, corporations and partnerships), since the 1978 Act eliminated the provision for discharge of debts of nonindividuals. 11 U.S.C. § 727(a)(1); *see* S. Rep. No. 989, 95th Cong. 2d Sess. 98 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 5884.

substances by preventing their uncontrolled discharge into the environment.

On the surface, these two purposes cannot be reconciled where the trustee legitimately invokes his power to abandon an asset whose manner of abandonment the state regulates. The question thus presents itself: did Congress intend that the trustee's abandonment power be unrestricted by public health and safety regulations? Our examination of the bankruptcy laws and the authorities interpreting these laws reveals no such congressional intent.

A.

We start with the basic assumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Penn Terra*, *supra*, slip op. at 11. Where it is argued that Congress intended to withdraw police power from a state, that intention must be unmistakable. *Penn Terra*, *supra*, slip op. at 11-12.

There is no legislative history of Section 554. Although there had been no express recognition of an abandonment power in the pre-1978 bankruptcy statute, courts approved the trustee's exercise of such a power as part of his larger power to dispose of the assets of the estate. *See* 4A Collier on Bankruptcy ¶70.42 at 502-504 & n. 4 (J. W. Moore 14th ed. 1978) (citing cases); *see also* 11 U.S.C. §§ 64a(4), 70a(2), 70b (1976) (repealed 1978) (provisions contemplating abandonment, respectively, of property against which taxes are assessed; of rights in pending applications for patents, copyrights, and trademarks; and of executory contracts). Section 554 obviously codifies this judge-made law.

Cases under prior law held that "the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature."

4A Collier on Bankruptcy (14th ed.), *supra*, ¶ 70.42[2] at 502-04. *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir.), *aff'g* 102 F. Supp. 913 (D. Md. 1952), held that the trustee could not abandon four worthless barges in a harbor, where abandonment would violate federal law relating to the obstruction of the harbor, even though the cost of complying with the laws would be much greater than the value of the barges. The court acknowledged the general rule that the trustee may abandon burdensome property, and then held it inapplicable.

> This rule would be applicable here were it not for the unusual consequences that would follow. There can be no doubt that the property not only has no value, but also that the care and disposition of it will involve the expenditure of a substantial sum of money. But it is equally true that if the trustee abandons the barges and at the same time holds on to the valuable assets of the estate, the title to the barges will revert to the bankrupt and he will be left without means to care for or dispose of them in the manner prescribed by the statute.
>
> In that event, the barges would sink and become an obstruction to the passage of other vessels, and it might well be held that the bankrupt or the trustee had become liable to the punishment of fine or imprisonment prescribed by the statute for the person who voluntarily or carelessly allows a vessel to be sunk in a navigable channel. It seems obvious to us that a rule which is not provided by statute but built up by the courts to facilitate the administration and distribution of the assets of a bankrupt estate should not be extended so as to reach such an unreasonable and unjust result. The judge-made rule must give way when it comes into conflict with a statute enacted in order to

> ensure the safety of navigation; for we are not dealing with a burden imposed upon the bankrupt or his property by contract, but a duty and a burden imposed upon an owner of vessels by an Act of Congress in the public interest.

198 F.2d at 290.

The concerns underlying this decision are, first, the comparative strengths of judge-made law relative to a conflicting statute, and second, the comparative strengths of policies which avoid burdens to the estate relative to the policies respecting safety of the public. With respect to each concern, the court held that the determinations of the legislature and the policy of safeguarding the public were paramount.

Another case, which relied in part on *Ottenheimer* and which emphasized a combination of these two concerns, is *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. 277 (Bankr. E.D. Pa. 1974). The court there held that the trustee could not abandon underground steam pipes, vents, and manholes, where abandonment would infringe on the public interest by creating health and safety hazards. *Lewis Jones* cited the principle announced in *S.E.C. v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940):

> [A] bankruptcy court is a court of equity and is guided by equitable doctrines and principles except as they are inconsistent with the Act. A court of equity may in its discretion, in the exercise of the jurisdiction committed to it, grant or deny relief upon performance of a condition which will safeguard the public interest.

(citations omitted). The trustees in *Lewis Jones* estimated the cost of alleviating the problems to be at least $82,000 (plus $500 per vent to fill in each of an unknown number of vents); there were funds of $328,000 on hand; creditors' claims amounted to

$4,478,000. The court found that the cost was "not too high a price to pay in the public interest." The court then ordered that permission to abandon be conditioned on the trustees' expending funds to fill in and seal the steam openings.

In a case relying similarly on the court's equitable powers, but grounding these in the jurisdiction conferred by statute, the court held that the trustees (in reorganization) for a railroad could not abandon service on a branch line even though operating the line would burden the estate with expenditures. *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942). In this case the railroad was a public utility, subject to state regulations that limited its power to abandon service without consent of the state authorities. The court first noted that under the supremacy clause, U. S. Const. Art. 6, cl. 2, the sole federal jurisdiction in bankruptcy, "when given expression in legislation by Congress," supersedes all inconsistent state laws. *Id.* at 4. It then observed that the power to abandon burdensome assets was incidental to the powers lodged in the bankruptcy court by the statute, and that "the intent and purport of all bankruptcy legislation, so far as the power to protect the estate is concerned, is largely declaratory of certain recognized equitable principles, namely: the power of a court of equity to protect property in its custody." 129 F.2d at 5. But, the court reasoned, if the traditional authority of the state to regulate local transportation should "be deemed withdrawn by Congress in bankruptcy legislation, evidence of that withdrawal in fit language should be found within the act." *Id.*, citing *Palmer v. Massachusetts*, 308 U.S. 79 (1939). It then held that Congress had not withdrawn the state's authority, and thus the trustees must comply with the valid state laws. The court distinguished the bankruptcy court's power to cancel

burdensome leases, so that the trustees were permitted to cancel the lease of the line from the interstate authority, and were ordered to continue operating the railroad but for the account of the lessor.

By contrast, recently another court held, while citing *Chicago Transit*, that the trustee for a bankrupt hospital could not be prevented from abandoning medical records even though a state law required insolvent hospitals to maintain and store them. *In re Adelphi Hospital Corp.*, Bankr. L. Rep. (CCH) ¶66,882 at 76,856 (2d Cir. 1978) (per curiam). The *Adelphi* court relied on the supremacy clause, and stated simply:

> It is beyond peradventure that federal law prevails over inconsistent state laws. U.S. Const. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. (S Wheat.) 1 (1824). This fundamental principle of American jurisprudence of course encompasses the bankruptcy laws. U.S. Const. art I. §8, cl. 4; *see, e.g., International Shoe Co. v. Pinkus*, 278 U.S. 261, 263-65 (1929). And under federal law, abandonment in this case is clearly permissible. *See In re Chicago Rapid Transit Co.*, 129 F.2d 1, 4-5 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942).
>
> The paramount purpose of bankruptcy liquidation and administration is the reduction of a bankrupt's property to money as expeditiously as practicable, so as to secure funds for distribution to general creditors. Hence the trustee in examining the various assets with regard to their potential value when converted into money for distribution to creditors is from the outset faced with the managerial duty to concentrate on property of possible benefit to the estate and to eliminate property that will be either valueless or unprofitable in its administration. . . The trustee

> . . . may abandon any property which is either worthless, or overburdened, or for any other reason certain not to yield any benefit to the general estate. 4A *Collier on Bankruptcy* ¶ 70.42, at 502 (14th ed. 1976) (footnotes omitted).

Id. at 76,857 (footnotes omitted). The court's bare citation of *Chicago Transit*, which had reached an opposite conclusion, is not very helpful. But the passage it cites emphasizes that the state regulation at issue was a part of public utility regulation of a service operated for public convenience and necessity. Thus *Adelphi* may be read as distinguishing state regulations on the basis of their relative importance to the public of their intrusiveness in the regulation of the industry.

Ottenheimer and *Chicago Transit* have similar rationales, but *Ottenheimer*'s stress in the judge-made character of the power to abandon is lacking in *Chicago Transit*. The two are consistent, however, in their reluctance to override state statutes in the absence of explicit Congressional direction: *Ottenheimer*'s stress on the judge-made character of the power to abandon is comparable to *Chicago Transit*'s emphasis on the lack of explicit intent to override state utility regulations. A common concern may thus be found in all four noted cases: that where important state law or general equitable principles protect some public interest, they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their supersession by the abandonment power.

B.

Thus, whether the trustee's power to abandon is limited depends in part on whether there is express federal law that either grants superseding power or

subjugates the abandonment power to state law even if that law would otherwise be inconsistent. Section 554 itself refers only to the trustee's affirmative power to abandon. Considered in the light of other provisions that both limit the supersession of state laws and specifically incorporate equitable principles into a bankruptcy court's jurisdiction, it is clear that Section 554 does not of itself preempt state police power regulations.

That Congress did not intend the bankruptcy scheme generally to abrogate the enforcement of state police power regulations is evidenced by, first, the express exception to the automatic stay otherwise imposed on all actions against the debtor, 11 U.S.C. § 362(a), for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." *Id.* § 362(b)(4). The exception applies "where a governmental unit is suing a debtor to prevent or stop violation of . . . environmental protection . . . laws, or attempting to fix damages for violation of such a law." S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Ad. News 5838. *See Penn Terra, supra*, slip op. at 15-25 (injunction to enforce compliance with state environmental protection laws is not money judgment, is not subject to § 362 stay); *Commonwealth v. Peggs Run Coal Co.*, 55 Pa. Cmwlth. 312, 923 A. 2d 765 (1980) (same); *cf. In re Canarico Quarries, Inc.*, 466 F. Supp. 1333, 1339-40 (D.P.R. 1979) (case under old law using new § 362(b)(4) as persuasive authority to hold not stayed a proceeding to enforce compliance with Federal Clean Air Act, 42 U.S.C. § 7401-7642 (1976)). *See also In re Kovacs*, 681 F.2d 454, 456 (6th Cir. 1982) (discussed in *Penn Terra, supra*, slip op. at 22 n.11), *vacated and remanded on other grounds*, 103 S. Ct. 810 (1983), *on remand sub nom. Ohio v. Kovacs*, 717 F.2d 985 (6th

Cir. 1983), *cert. granted*, No. 83-1020, 52 U.S.L.W. 3650 (U.S. March 5, 1984).

A second indication that the bankruptcy scheme is not intended to abrogate relevant state laws is found in 28 U.S.C. § 959(b) (1982):

> (b) Except as provided in section 1166, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

The trustee in this case argues that Section 959(b) is inapplicable outside a chapter 11 proceeding (Br. at 12), where the trustee is managing the debtor's business, *see* 11 U.S.C. § 1108 (1982). Even in a chapter 7 proceeding, however, the trustee may be authorized to operate a business. *Id.* § 721. Thus there is no reason to suppose Section 959(b) inapplicable in chapter 7.

Implicit in Section 959(b) is the notion that the goals of the federal bankruptcy laws, including rehabilitation of the debtor, do not authorize transgression of state laws setting requirements for the operation of the business even if the continued operation of the business would be thwarted by applying state laws. *See Gillis v. California*, 293 U.S. 62 (1934); *In re Dolly Madison Indus.*, 504 F.2d 499 (3d Cir. 1974); *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333 (D.P.R. 1979). New York argues that this principle extends to the liquidation process, contending that the goal of the federal bankruptcy law here -- distribution of the assets to creditors -- does not

authorize transgression of state laws setting requirements for disposal of assets.

Our examination of Section 959(b) leads us to conclude that although it is not itself an independent prohibition of the trustee's abandoning property in contravention of state law, it is a clear indication that in general the congressional scheme was not intended to subjugate state and local regulatory laws. As a matter of simple statutory construction, the applicability of Section 959(b) would seem open to question. The provision speaks in terms of "manage[ment]" and operat[ion] of the "property." It would not strain the language to construe "management of the property" to include abandonment of a facility. Nor would it be a gross misreading to construe "manage and operate" narrowly, to mean only the administration of the business as a going concern. Again, we have found no legislative history.

Section 959(b) refers to the railroad reorganization provisions of the Bankruptcy Act; these permit the court to authorize abandonment of a line if it is consistent with the public interest. 11 U.S.C. § 1170(a). But since railroad reorganization is treated as *sui generis* within the Act, *see* 11 U.S.C. § 1161, this reference is of little relevance to the inquiry except as it indicates that state laws are not applicable to abandonment of a railroad line (although the extent of their applicability in determining the public interest is not indicated).

The trustee cites two authorities for support of a narrow construction of the provision. One is a footnote in *Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 778 n. 18 (8th Cir. 1981), in which the court stated, in dictum and without analysis, its "doubt" that a Chapter XI trustee for a grain elevator would be prohibited from selling grain in the exercise of his

power to liquidate assets even though state law required a license to sell grain. By contrast the trustee would, by Section 959(b), be required to obtain a state license to operate the grain warehouses. *Id.* at 778. This case would seem to be authority for a distinction between operation of a business and liquidation of its assets. There was, however, no showing that failure to comply with the state law in question would in any way affect the public health, safety, or welfare, in contrast to the case here. Would the 8th Circuit have so readily dismissed the issue if the trustee had been selling spoiled grain, in contravention of state law? Its terse statement is devoid of analysis and is therefore of little help to the trustee's cause here.

The trustee also relies, as did the court below, on a statement in a treatise:

> But § 959(b) applies only to the receiver in his operation of the property in his possession. It does not require the federal receivership court to comply with state laws regulating the distribution of funds in receivership, although *Erie R. Co. v. Tompkins* should now require it to do so in cases involving only non-federal matters.

7-pt 2 Moore's Federal Practice, ¶ 66.04[4] at 1913 (J. Moore & J. Lucas 2d ed. 1982) (footnotes omitted). This paragraph is authority for a basic distinction between distribution of funds in liquidation and operation of a business. Again, though, its reach is limited. Clearly state law regulating the distribution of assets among creditors must give way to the all-encompassing federal law of creditors' rights. *American Surety Co. v. Sampsell*, 327 U.S. 269, 272 (1946). It does not follow that state police power regulations must also give way.

Chicago Transit, supra, 129 F.2d at 6, noted that prohibiting abandonment in that case while

permitting the trustee to cancel the lease would not violate the predecessor to Section 959(b), 28 U.S.C. § 124 (1940), which required that federal receivers operate trust property in accordance with the laws of the state as the owner would be bound to do. There would be no violation because the trustee was ordered to comply with state law to the extent it required service to be continued; but the state's authority could not be extended to the protection of existing contracts, rather these could be abrogated by the court in its exercise of equitable powers.

Chicago Transit, however, is not precisely on point here: the state law required operation of the business, whereas New York law here only limits abandonment (disposal) of the facilities and does not speak to operation of the business. Thus the *Chicago Transit* case does not answer the inquiry whether Section 959(b) applies outside of the operation of a business (or maintenance of its assets in anticipation of such). But it would be an overly literal reading that would dismiss wholly the import of the provision on the ground that "abandonment" of property is distinguishable from "management" of property. The interests at stake are not so different; in each case the creditors have an interest in preserving the debtor's estate so as to maximize their proportionate recovery; indeed, when the debtor's business is managed on a chapter 11 proceeding, there is another interest to be considered, the debtor's interest in rehabilitating the business as a going concern. Thus, since courts have been willing to find Section 959(b) applicable even if these two interests are thwarted, *a fortiori* it is not inapplicable just because one interest is adversely affected.

Thus, at the very least, the existence of Section 959(b) indicates that Congress has not "unmistakably ordained" that state law is superseded by the trustee's powers to administer the property of the estate.

The third, and final, consideration that informs our decision is the provision in the bankruptcy act for the application of equitable principles to determine the efficacy of requested relief. In addition to the powers given to the court in 11 U.S.C. § 105 to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Act, 28 U.S.C. § 1481 establishes the jurisdiction of the court to include all the powers of a court of equity.[8] Under the old bankruptcy statute, under which bankruptcy courts had been given "such jurisdiction at law and equity as will enable them to exercise original jurisdiction," 11 U.S.C. § 2 (1976) (repealed) it was held that bankruptcy courts are courts of equity and may apply equitable doctrines and principles insofar as they are consistent with the statute. *SEC v. United States Realty Co.*, *supra*, 310 U.S. at 455; *Pepper v. Litton*, 308 U.S. 295, 304-05 (1939).

This same proposition has been held applicable to the 1978 Act: "[B]ankruptcy courts are courts of equity, but at the same time, authorized to prevent courses of conduct otherwise fraudulent, abusive or unfair." *In re Multiponics, Inc.*, 622 F.2d 709, 721 (5th Cir. 1980) (citations omitted, but citing *Pepper v. Litton*, *supra*).

Thus, since there is no unmistakable evidence of congressional intent to abrogate the enforcement of state environmental protection laws -- rather, there is evidence of an intent to accommodate such laws -- and since equitable principles must be applied, federal law is supreme only if those principles demand that state

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8. Section 1481 did not technically become effective until April 1, 1984, but transition provisions of the Bankruptcy Reform Act vest courts with the same authority they would have as of that date. *See* Pub. L. No. 598, 95th Cong., 2d sess. § 405(b) (1978); *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 100 n.2 (3d Cir. 1981).

police powers be suspended to the extent they interfere with the liquidation of the estate.

C.

The cases discussed *supra* that stand for the proposition that equitable principles are applicable in determining whether a trustee may abandon property in contravention of state law require that a court balance the relative weight of the state and federal policies. In this case, the state and local regulations advance a very important policy: to protect the public health by regulating disposal of toxic wastes. Abandonment by the trustee clearly contravened applicable law, and did so not merely technically, but with severely deleterious implications for the public safety. The great weight thus attaching to the state's interest makes this case more akin to those of *Ottenheimer v. Whitaker*, *supra*, and *In re Lewis Jones*, *supra*, than it is to *In re Adelphi Hospital*. The weight of state law is reflected also in the fact that (as in *Ottenheimer*) violation of the disposal regulations may constitute a felony. *See* N.Y. Envtl. Conserv. Law § 71.2721 (McKinney Supp. 1982).

To be weighed against this manifestly important public policy is the policy advanced by abandonment, to preserve as much of the estate as possible for distribution to creditors. This policy must be viewed in light of the indications of a concurrent federal legislative policy to limit intrusion into state police power regulations, including environmental protection laws, delineated *supra*. Here, it is undisputed that compliance with hazardous waste disposal laws required substantial expenditures, thus depleting the assets of the estate available for distribution to creditors.

But the extent (unproven in these proceedings)[9] of the expenditures necessary to dispose of the waste properly is not in itself sufficient to outweigh the public interest at stake here. It is only recently that the public has learned of the magnitude of the dangers associated with toxic waste disposal; at the same time, the last few years have witnessed a rising tide of bankruptcies. Lurking in the shadows of these phenomena is the spectre of the changing fortunes of the nuclear power industry, with the concomitant potentiality for unusable facilities. If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation -- the substitution of governmental action for citizen compliance -- without an indication that Congress so intended.[10] The

9. The issue of the exact amount of the depletion was never brought before the bankruptcy court, or the district court. The Trustee alleged that the property itself had a fair market value of $535,000, and a forced sale value of $428,000, both at the time subject to mortgages in excess of $450,000. Tr. of June 8, 1982 Bankruptcy Hearing at 2. But this does not relate the expense to the size of the debtor's estate. The Trustee did note that at the time he was unable to liquidate some major assets (such as oil). *Id.* at 11-12.

10. Indeed, Congress has elsewhere indicated an intent that governmental units be reimbursed, by those responsible for storage, transport, and disposal of hazardous wastes, for government's costs of emergency cleanup of inactive hazardous waste sites by creating a federal cause of action for reimbursement. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9607 (Supp. V 1981) ("superfund"

supremacy clause does not require the suspension of the operation of New York's hazardous waste disposal laws.[11]

III.

New York requests that it be reimbursed, out of the assets of the estate, for its cleanup costs as an

legislation); one objective of imposing liability was "to induce such [liable] persons *voluntarily to pursue appropriate environmental response actions* with respect to inactive hazardous waste sites." H. Rep. No. 1016, Pt. I, 96th Cong. 2d Sess. 17 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 6120 (emphasis added).

11. As support for its basic position that the abandonment power is not limited by state law, and not as a separate or discrete issue or independent bar to the enforcement of state law, the Trustee contends that prohibiting abandonment may effect an unconstitutional taking under the Fifth Amendment. The Trustee argues that use of the estate's assets to comply with state law may deplete the estate to such an extent that the secured creditors will receive less in satisfaction of their claims than they otherwise would have.

The rights of a secured creditor in the debtor's assets are "property" subject to a "taking." *See United States v. Security Indus. Bank*, 103 S. Ct. 407, 411 (1982). But we are not persuaded by the Trustee's argument that an unconstitutional taking could result from forbidding abandonment here. First, the state's enforcement of its environmental protection laws cannot be characterized as a taking; rather it is a permissible exercise of the state's regulatory power to promote the public good, under a long line of cases dealing with just that distinction. *E.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) (municipal zoning ordinances restricting type and density of buildings held not a taking); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (landmark preservation ordinance); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (town ordinance prohibiting use of land for mining); *Miller v. Schoene*, 275 U.S. 272 (1928) (statute requiring landowner to destroy diseased cedar trees); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (industrial zoning regulation); *Hadecheck v. Sebastian*, 239 U.S. 394 (1915) (municipal ordinance prohibiting brickmaking); *Mugler v. Kansas*, 123 U.S. 623 (1887) (state statute declaring places of manufacture of liquor

"administration expense," *see* 11 U.S.C. §§ 503(b) & 507(a).

Section 503(b) lists several categories of allowable administrative expenses. The categories are not exclusive: administrative expenses "including" those listed are allowed, and "including" is not exclusive, 11 U.S.C. § 102(3). The only relevant category of those listed would seem to be Section 503(b)(1)(A), "actual, necessary costs of preserving the estate." Preservation

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to be nuisances); *Troy v. Renna*, 727 F.2d 287 (3d Cir. 1984) (state statute creating statutory tenancies for senior citizens and disabled persons). *See generally* Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1183-84 (1967) (factors relevant to classifying an action as regulation or taking).

Second, the Trustee contends that this case presents the possibility of an "erosion taking," citing to the *Regional Reorganization Act Cases*, 419 U.S. 102 (1974), and *In re New York, N.H. & H .R.R.*, 330 F. Supp. 131, 147 (D. Conn. 1971), *rev'd on other grounds*, 457 F.2d 683 (2d Cir. 1972) (lack of subject matter jurisdiction); *see also New Haven Inclusion Cases*, 399 U.S. 392 (1970). The doctrine in those cases, even if deemed to be applicable here (and we have serious doubts that it would be applicable, because of the sui generis nature of the subject matter, railroad reorganization) would require a balancing of the losses to the estate against the public interest. Whether an erosion taking will result would depend under this theory on whether forcing expenditure of assets by preventing abandonment will cause "losses unreasonable even in light of the public interest." *Regional Railroad Reorganization Act Cases*, *supra*, 419 U.S. at 124 (taking by accrual of post-bankruptcy claims with priority over those of claimants). We cannot say that the public interest would be outweighed by losses here. Our prior analysis applies with equal force here in determining whether it is constitutionally "unreasonable" to require that the estate's assets be expended to comply with toxic waste disposal law as a condition of abandonment. *Cf. City of Paterson v. Fargo Realty, Inc.*, 174 N.J. Super. 178, 415 A.2d 1210 (1980) (not unconstitutional to require owner to reimburse city for expenses incurred in razing structure that was public nuisance).

includes the costs of custodial care or insurance, *see* 3 Collier on Bankruptcy (L. King 15th ed. 1983), *supra*, ¶ 503.04 at 503-16, and necessary repairs, *id*. We need not, however, reach the issue of the priority, if any, of New York's claim. That is an issue that can properly be resolved only by the bankruptcy court, since the issue was not treated in the proceedings below and so the record on appeal does not include findings of relevant fact.

IV.

The order of the district court dated January 25, 1983, which affirmed the order of abandonment will be reversed, and the case remanded for proceedings consistent with this opinion.

Each party will bear its own costs.

GIBBONS, *Circuit Judge*, dissenting:

The majority opinion poses as the issue in this case whether 11 U.S.C. § 554 (1982) "permit[s] the abandonment of property of the bankrupt estate in contravention of state and local environmental protection laws?" Maj. op., typescript at 3. In focusing on this single issue, however, the majority fails to consider additional points of extreme relevance to this case.

State and local environmental protection laws simply do not address federal bankruptcy law interests, including whether and under what circumstances the trustee of a debtor's estate must take possession of all property in the estate. After all, trustees are creatures of federal law. They are appointed not for the benefit of the world at large, but solely for the purpose of liquidating property for the benefit of creditors, a federal interest. *See* 11 U.S.C. § 704 (1982). Some state environmental protection laws, like those of New York, attempt to impose expenses on the debtor's estate that

would leave no equity to be liquidated. In this case, for example, it is undisputed that New York law would leave the debtor's estate with no actual or potential equity in the Long Island City property. By forcing the trustee to take possession of property in which there is no equity, the court serves no interest that the bankruptcy laws address. By not confronting that reality, the majority opinion fails to resolve critical issues in this case: how can the trustee reach into the creditors' pockets for the cost of the cleanup, and if he can, which creditor's pocket?

The proper analysis must begin with the relevant statute and the question of the trustee's right to abandon the property. Section 554 of title 11 states clearly:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burden some to the estate or that is of inconsequential value to the estate.

11 U.S.C. § 554(a) (1982). There is no legislative history suggesting that we may alter or amend that language. The intent is clear. The record here establishes that the property is burdensome and of inconsequential value to the estate. A finding by the bankruptcy court to that effect has not been challenged on appeal. Thus, under federal law, the trustee may abandon the property.

This point is challenged, however, by the State and City of New York, who argue that such abandonment cannot be permitted when it would violate the public interest and federal, state and local environmental laws. Appellants cite for support a Fourth Circuit and a bankruptcy court case for the proposition that abandonment may be denied when such abandonment would threaten public health and safety and/or violate federal law. The cases presented by appellants are *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir.), *aff'g* 102 F. Supp. 913 (D. Md. 1952), and *In re Lewis Jones*, 1 B.C.D. 277 (Bk. Ct. E.D. Pa. 1974).

Neither of these opinions, however, is persuasive under the 1978 Bankruptcy Reform Act. Both substitute slogans about equity for an analysis of the purpose of bankruptcy proceedings. Both, moreover, were decided prior to the enactment of the Bankruptcy Reform Act of 1978, and its codification in 11 U.S.C. § 554 (1982) of the express authority for trustees to decline to undertake responsibility for property which cannot benefit the estate. Thus there was no statutory provision permitting trustees to abandon burdensome property at the time of those decisions. Such an express statutory provision now exists. Moreover, Congress did *not* see fit to provide an exception to this statutory power, whether for the public interest or any other purpose, as it has in other areas. *Compare* 11 U.S.C. § 362(a) (1982) (exception to automatic stay); *Penn Terra Ltd. v. Department of Environmental Resources*, 733 F.2d 267, 274-79 (3d Cir. 1984) (injunction to enforce compliance with state laws is not a money judgment, and is therefore not subject to § 362 stay) *with* 11 U.S.C. § 554 (1982). Thus *Ottenheimer* and *Lewis Jones* are not helpful.[1]

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1. Both cases acknowledge that the rules regarding abandonment in their case were judge-made:

> It seems obvious to us that a rule which is not provided by statute but built up by the courts to facilitate the administration and distribution of the assets of a bankrupt estate should not be extended so as to reach such an unreasonable and unjust result. The judge-made must give way when it comes into conflict with a statute enacted to ensure the safety of navigation . . .

Ottenheimer, 198 F.2d at 290; *see Lewis* 1 B.C.D. at 279; *see also* Missouri v. United States Bankruptcy Court, 647 F.2d 768, 778 n.18 (8th Cir. 1981) (doubtful tht trustee could be prevented from

The majority opinion is also inconsistent with the Supreme Court's recent decision in *United States v. Security Industrial Bank*, 103 S. Ct. 407 (1982). There the Supreme Court held that the Bankruptcy Act should not be construed to destroy the interests of creditors when a substantial question arises as to whether the Act constitutes a taking of property without just compensation. The holding in *Security Industrial Bank* is simply a corollary of the longstanding doctrine that we are obliged "first [to] ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *United States v. Security Industrial Bank*, 103 S. Ct. at 412 (*quoting Lorillard v. Pons*, 434 U.S. 575, 577 (1978) and *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Similarly, "in the absence of a clear expression of Congress' intent . . . [a court should] decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the' takings clause." *Security Industrial Bank*, 103 S.Ct. at 414 (*quoting NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979)).

The Supreme Court has indicated that creditors cannot be forced to operate a business, no matter how vital to the public interest, at a loss. *See Railroad Commission of Texas v. Eastern Texas Railroad Company*, 264 U.S. 79, 85-86 (1924); *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U.S. 396, 399 (1920); *see also Regional Railroad*

selling grain to liquidate assets even though state law requires license to do so); In re Adelphi Hospital Corp., Bank. L. Rep. (CCH) ¶ 66,882, at 76,856 (2d Cir. 1978) (bankrupt hospital's trustee can abandon medical records even though state law requires their maintenance); *see generally* In re Chicago Rapid Transit Co., 129 F.2d 1, 5 (7th Cir.), *cert. denied*, 317 U.S. 683 (1942) (pre-statute case stating withdrawal of state power should be stated in Act).

Reorganization Act Cases, 419 U.S. 102, 122 (1974); *Bullock v. Railroad Commission of Florida*, 254 U.S. 505, 520-21 (1921). In the *Regional Railroad Reorganization Act Cases*, the Supreme Court did not "balance" the interest of creditors against that of the public. *See* 419 U.S. at 122-36. The Court upheld the Regional Railroad Reorganization Act only because there was an available remedy in the Tucker Act, 28 U.S.C. § 1491 (1982), for the operational losses which that Act imposed. 419 U.S. at 136. New York does not suggest that its law provides an equivalent remedy. The name of its game is transferring the cost of cleanup to secured and unsecured creditors of the debtor, in this instance outside New York, who have no interest whatever in the Long Island City property, and who, on the record before us, were in no way responsible for placing the contaminated oil on that site.

Thus, the majority's construction of the Act raises a substantial question under the taking clause of the fifth amendment.[2] The holding of *Security Industrial*

2. The "taking" concern has been raised previously:

> [T]he public interest cannot demand the erosion of the bankrupt's assets to the point of confiscating practically the entire estate. At some point the extent and degree of taking runs into the constitutional prohibition in the Fifth Amendment [on] the taking of private property for public use without just compensation.

In re New York, New Haven and Hartford Railroad Co., 330 F. Supp. 131, 147 (D. Conn. 1971); *see also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 423 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News, 5963, 6379:

> Subsection (a) [11 U.S.C. § 1170(a)] permits the court to authorize the abandonment of a railroad line if the abandonment is consistent with the public interest and either in the best interest of the estate or essential to the formulation of a plan . . . The authority to abandon or

Bank compels a construction of section 554 that avoids this difficult constitutional issue. Such a construction is available, for the plain language of that section permits abandonment in this case; moveover, there is no legislative history to that section providing any exceptions to the statute or expressing any intent contrary to abandonment by a trustee of property found to be burdensome or of inconsequential value. A fair reading of section 554 permits abandonment in this case and thus avoids the constitutional question presented by the taking clause.

The majority opinion deals with the taking problem in a footnote. Maj. op., typescript at 26 n.ll. That footnote, however, puts the rabbit in the hat by concluding perfunctorily that the New York statutes at issue constitute a "regulation" rather than a "taking" of property.[3] That is not the analysis of *Security Industrial Bank*. The Supreme Court requires that we address whether a substantial question under the taking clause arises; the *Regional Railroad Reorganization Act Cases* raise such a question. We are therefore required to construe the Bankruptcy Act accordingly.

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not to abandon lines of railroad is, of course, subject to the fifth amendment of the Constitution, which may in particular cases require abandonment in order not to erode a secured creditor's interest in the debtor's property even though the public interest dictates otherwise.

3. In its taking analysis, the majority opinion characterizes the environmental protection laws as an example of "the state's regulatory power to promote the public good" (citing cases). Maj. op., typescript at n. ll. The cases cited, however, do not address the question of imposing an obligation on third parties. Thus the police power cases are irrelevant to the issue of an obligation on the part of innocent creditors to undertake compliance with the police power statutes.

The majority opinion sidesteps a key issue by stating that "we need not . . . reach the issue of the priority, if any, of New York's claims." Maj. op., typescript at 28.[4] Yet, the record is unequivocal. The debtor's estate has no equity whatever in the Long Island waste oil storage facility. Thus the necessary implication of the majority's holding is that property situated elsewhere must be expended for the purpose of complying with the New York toxic waste laws. Whether that expenditure is justified because New York law imposes a lien or charge on property situated elsewhere or because New York law requires that the expenditures be treated as costs of administration under ll U.S.C. §§ 503(b), 507(a)(1982), the outcome is the same, for the majority's opinion cannot conceal the patent reality that the cost of cleaning the Long Island City site must come from someone's pocket. Remanding without addressing the question of whose pocket is irresponsible.

The majority's reliance on 28 U.S.C. § 959(b) (1982) is off the mark. If the trustee, or any other court officer, undertook to *operate* the Long Island facility, that officer would be required to operate it in compliance with local police power regulations by virtue of section 959(b). But section 959(b) cannot be construed as imposing an obligation to operate *any* business or property. In proceedings for reorganization or liquidation a trustee will undertake to operate a business or property only when such operation can inure to the benefit of some part, having an interest in the estate. Were section 959(b) to be construed otherwise it would violate the fifth amendment

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4. The majority opinion appears to refer to an affidavit stating that some parties with priority liens relinquished them in favor of a first lien sought by the State and City. *See* Affidavit of Nancy Stearns, December 22, 1982.

prohibition against taking without just compensation. *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 118, 125 (1974); *see United States v. Security Industrial Bank*, 103 S.Ct. 407, 411 (1982) (secured creditor's rights in debtor's assets are "property" subject to "taking").[5]

The majority's argument is not advanced by its observation that "[t]he supremacy clause does not require the suspension of New York's hazardous waste disposal laws." Maj. op., typescript at 26. Those laws are not suspended by the district court's disposition. They have operated so as to eliminate any interest that the debtor's estate might have had in the Long Island City plant. They may result in criminal prosecution of the persons actually responsibile for placing the toxic substances on the site. *See, e.g.*, N.Y. Envtl. Conserv. Law § 71.2721 (McKinney Supp. 1982). Moreover, those laws do not by their terms give fair notice to secured and unsecured creditors of the debtor that *they* would become liable for the cost of cleanup merely by extending credit to a corporation which unknown to

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5. There is further evidence of doubt as to whether section 959(b) applies to Chapter VII proceedings. Professor Moore stated:

> [Section] 959(b) applies only to the Receiver in his operation of property in his possession. It does not apply to the distribution of the estate, and does not require the federal receivership court to comply with state laws regulating the distribution of funds in the receivership . . .

7 J. Moore & J. Lucas, Moore's Federal Practice § 66.04(4), at 1913 (2d ed. 1982). Moreover, although a trustee may be authorized to operate a business under section 721, such operation may occur only "for a limited period" and only "if such operation is *in the best interest of the estate* and consistent with the orderly liquidation of the estate." 11 U.S.C. § 721 (1982) (emphasis suplied). Such authorization here clearly would not be in the best interests of the estate.

them should in the future violate the law. Nor do they give notice to a trustee in bankruptcy that he would, merely by virtue of his appointment, become responsibile for undoing the effects of a debtor's prior unlawful activities.

Without definitely resolving the question, the majority suggests that 11 U.S.C. § 503(b)(1)(A) (1982), dealing with allowable costs of administration, and 11 U.S.C. § 102(3) (1982), dealing with an expansive rule of construction, may authorize the imposition of cleanup costs on other creditors. Maj. op., typescript at 27-28. The suggestion that the cleanup cost might be classified as a "preservation expense" of a property is preposterous. Upon abandonment, title to the property revests in the bankrupt. Fiduciaries are not at liberty to "preserve" the property in which their cestui have no interest. The reference to the court's "equitable" powers, Maj. op., typescript at 22-24, assumes that the court has "equitable" power to compel the operation of a business at a loss in the public interest. As discussed earlier, the taking clause of the fifth amendment, applicable to the states by virtue of the fourteenth, prevents the exercise of any such "equitable" power. Before the trustee may incur expenses of administration to which section 102(b) may apply, there must be an identifiable source of authority for making such expenditures. None exists.

Finally, the majority remands to the district court with no guidance about the critical issues in this case. That court has already determined that New York law does not and, in light of the supremacy clause, cannot compel a trustee in bankruptcy to undertake possession or operation of a business from which the estate can derive no benefit. On remand the court will still be at a loss to determine how, consistent with the taking clause, the trustee can reach into the creditors' pockets for the cost of cleanup, and if he can, which

creditors' pockets. The majority remands with no more than a hope that the court can get money somewhere.

Since the record is clear that the debtor's estate does not have any actual or potential equity in the Long Island City property, and New York has not pointed to any other specific property on which it has a valid lien for the cost of cleanup of that site, the district court did not err in authorizing abandonment. Certainly that order was not an abuse of discretion. Nowhere does the majority disclose what alternative course might have been pursued. I would affirm now, as we surely will have to affirm later, when the district court points to the obvious fact that there must be a source of funds before expenditures can be made.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion of the United States Court of Appeals for the Third Circuit (No. 83-5730)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5730

IN RE: QUANTA
RESOURCES CORPORATION

Debtor

THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Appellant

On Appeal from the United States
Bankruptcy Court for the
District of New Jersey

(Bankruptcy No. 81-05967)

Submitted Under Third Circuit Rule 12(6)
June 19, 1984

Before: GIBBONS, GARTH and
HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed July 20, 1984)

Irwin I. Kimmelman
Attorney General of New Jersey
James J. Ciancia
Assistant Attorney General
Richard F. Engel
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Appendix B

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Attorneys for Appellees
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Albert Von Dohlin

OPINION OF THE COURT

GARTH, *Circuit Judge*.

This appeal presents us with the identical issue presented by the companion case of *In re Quanta*

Appendix B

Resources Corp. (City of New York and State of New York v. Quanta Resources Corp.), No. 83-5142. Because we have decided to reverse the district court's order in the companion case, in which New York was the appellant, we will also reverse the bankruptcy court's order in this case.

I.

Quanta Resources Corp. (Quanta) leased and operated a facility on a site in Edgewater, New Jersey, at which Quanta processed and resold waste oil and oil sludge. Quanta operated the site under "temporary operating authorities" (TOA's) issued by the New Jersey Department of Environmental Protection (NJDEP). These TOA's prohibited Quanta from accepting PCB-contaminated oil.

On June 23, 1981, NJDEP found PCB-contaminated oil at the site. On July 2, 1981, Quanta agreed to cease operating at the Edgewater location. On October 6, 1981, while NJDEP and Quanta were negotiating as to Quanta's obligation to clean up the contaminated oil, Quanta filed a petition in bankruptcy under chapter 11 of the Bankruptcy Code, an action which was later (on November 12, 1981) converted to a chapter 7 liquidation. On October 7, 1981, NJDEP issued an administrative order requiring Quanta to cease operations, close the facility within one year, and clean up all hazardous materials.

On April 23, 1983, the Trustee for Quanta gave notice of proposed abandonment of the facility under 11 U.S.C. § 554 of the Bankruptcy Code, including the waste oil contained in tanks. The Trustee excepted from this notice that part of the oil which was free of significant contamination from PCB's and was the subject of a pending sale agreement.

NJDEP opposed the abandonment, arguing that the abandonment would violate New Jersey law

because oil contaminated with PCB's must be stored and disposed of in compliance with state regulations. According to the state, abandonment would contravene these requirements and pose a threat to public health and safety because the oil was stored in leaking and insecure tanks, creating a danger of spillage into the Hudson River. NJDEP argued that the estate had sufficient funds to protect the public from the hazards.

After a hearing, by order dated May 20, 1983, the Bankruptcy Court authorized the requested abandonment of the oil, the order stating that its entry was to "be deemed to constitute the abandonment of the . . . property by the Trustee effective May 17, 1983, *nunc pro tunc.*" *In re Quanta Resources Corp.*, No. 81-05967 (Bankr. D.N.J. May 20, 1983). The sale of the remaining oil was completed in June 1983, and the Trustee vacated the premises on July 1, 1983.

The parties consented to NJDEP's taking a direct appeal to this court under 11 U.S.C. § 405(c)(1)(B). We therefore have appellate jurisdiction. *See* 28 U.S.C. § 1293(b) & note preceding *id.* § 1471 (appellate jurisdiction to consider such appeals).

II.

The instant case does not present us with a significantly different factual situation from that presented to us in *In re Quanta Resources Corp.*, No. 83-5142. In this case, abandonment of the property and the toxic oils will effect a disposal of toxic waste in a manner that contravenes New Jersey environmental protection law.[1] There is no principled distinction

1. NJDEP argues that federal environmental law is also violated by the abandonment. Since NJDEP has not persuaded us that it has the power to enforce federal law in this situation, there is no issue before us as to a conflict between the abandonment power under § 554 of the Bankruptcy Code and federal environmental protection law.

between the issues presented in this case and those presented in the companion *Quanta* case in which New York is the appellant. Thus the analysis and reasoning of No. 83-5142 apply equally to the case at bar. We hold that the Trustee does not have the right to abandon property of the estate where abandonment contravenes state public health and safety laws, as it does here.

Because NJDEP -- unlike the City and State of New York in the companion case at 83-5142 -- has not argued that it should be reimbursed for any expenses incurred in cleaning up or restoring the property (indeed NJDEP has not asserted that it incurred any such expenses),[2] we have no cause to address that issue. This point serves to emphasize the scope of our central holding in these two cases -- that enforcement of state public health and safety laws is not superseded by the power of abandonment contained in section 554 of the Bankruptcy Code. The issue is not who should pay to clean up the estate's property; it is whether the Trustee's interest in preserving the estate should prevail over the public's interest in containing the hazards produced by toxic wastes in the possession of the estate. As in the companion case where the State and City of New York are appealing, we are convinced that the equities must be balanced in favor of the public interest.

III.

The bankruptcy court's order authorizing abandonment of the estate's property at the Edgewater site will be reversed and the case remanded to the

2. NJDEP did claim an interest in the property prior to abandonment, as did Midlantic National Bank, an appellee here. However, the nature of that interest has not been disclosed to us and it is not a factor for consideration on this appeal.

Appendix B

bankruptcy court for further appropriate proceedings in light of both *Quanta* opinions.

GIBBONS, *Circuit Judge*, dissenting:

The same issue is before us as was presented in the companion case *In re Quanta Resources Corp. (City of New York and State of New York v. Quanta Resources Corp.)*, No. 83-5142. I would affirm the bankruptcy court's order in this case for the same reasons stated in my dissent in the companion case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C

Orders Amending Opinion (No. 83-5730)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5730

IN RE: QUANTA RESOURCES CORPORATION

Debtor

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appellant

Before: GIBBONS, GARTH and HIGGINBOTHAM, *Circuit Judges*

ORDER AMENDING OPINION

IT IS ORDERED that the opinion in the above-captioned matter, filed July 19, 1983, is hereby amended as follows:

Add, immediately after the last sentence of the opinion, the following new paragraph:

Each party will bear its own costs.

BY THE COURT,

Leonard I. Garth

Circuit Judge

DATED: July 25, 1984

Appendix C

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5730

IN RE: QUANTA
RESOURCES CORPORATION

Debtor

THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Appellant

On Appeal from the United States
Bankruptcy Court for the
District of New Jersey

(Bankruptcy No. 81-05967)

Submitted Under Third Circuit Rule 12(6)
June 19, 1984

Before: GIBBONS, GARTH and
HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed July 20, 1984)

ORDER

It is ORDERED

That so much of the designation of attorneys for the appellant that appears on the cover of the above entitled opinion be amended to read as follows:

Appendix C

Irwin I. Kimmelman
Attorney General of New Jersey
James J. Ciancia
Assistant Attorney General
Richard F. Engel
Deputy Attorney General
Ross A. Lewin, Esq.
Deputy Attorney General

By the Court

/s/ Leonard I. Garth
United States Circuit Judge

Dated: August 17, 1984

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

APPENDIX D

Judgment of the United States Court of Appeals for the Third Circuit (No. 83-5142)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-5142

IN THE MATTER OF

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

Debtor

CITY OF NEW YORK and
THE STATE OF NEW YORK

vs.

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

State of New York and City of New York,

Appellants

(D. C. Civil No. 82-3524)

Appendix D

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY, Newark

Present: GIBBONS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States Bankruptcy Court for the District of New Jersey, Newark and was argued by counsel October 24, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered January 25, 1983, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Each party to bear its own costs.

ATTEST:

SALLY MRVOS
Clerk

July 20, 1984

Certified as a true copy and issued in lieu of a formal mandate on August 28, 1984.

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX E

Judgment of the United States Court of Appeals for the Third Circuit (No. 83-5730)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-5730

IN RE:

Quanta Resources Corporation,
Debtor

The New Jersey Department of Environmental Proection,
Appellant

(Bankruptcy No. 81-05967)

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY, Newark

Present: GIBBONS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

Appendix E

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States Bankruptcy Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on June 19, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court filed May 20, 1983 be, and the same is hereby reversed and the cause remanded to the said Bankruptcy Court for further appropriate proceedings in light of this Court's opinions in this appeal and in *In re Quanta Resources Corp.* (*City of New York and State of New York* v. *Quanta Resources Corp.*), No. 83-5142 (3rd Cir. July 20, 1984). Each party will bear its own costs.

ATTEST:

SALLY MRVOS
Clerk

July 25, 1984

Certified as a true copy and issued in lieu
of a formal mandate on August 28, 1984.

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals
for the Third Circuit.

APPENDIX F

Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Crcuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 83-5142

IN THE MATTER OF

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

Debtor

THE CITY OF NEW YORK and
THE STATE OF NEW YORK

v.

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

State of New York
and City of New York

Appellants

Appendix F

No. 83-5730

IN RE:

QUANTA RESOURCES CORPORATION

Debtor

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appellant

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The joint petition for rehearing filed by debtor, Quanta Resources Corporation, and appellee, Thomas J. O'Neill, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix F

Judge Gibbons would grant the petition for rehearing for the reasons set forth in his dissenting opinions.

By the Court

LEONARD I. GARTH
Circuit Judge

DATED: August 16, 1984

APPENDIX G

Memorandum Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(B. 81-5967)

Civil No. 82-3524

IN THE MATTER OF

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

Debtor.

THE STATE OF NEW YORK and the CITY OF NEW YORK,

Appellants,

v.

THOMAS J. O'NEILL, Trustee in Bankruptcy of Quanta Resources Corp., Debtor,

Appellee.

January 24, 1983

Appendix G

BEFORE:

The Honorable FREDERICK B. LACY, U.S.D.J.

MEMORANDUM OPINION

The Court: This matter is before the court on an appeal from the decision of the Bankruptcy Court which permitted the trustee to abandon property over objections by the City and State of New York.

Quanta Resources ("Quanta") filed a Voluntary Petition in Bankruptcy pursuant to Chapter XI of the Bankruptcy Code. These proceedings were converted to a Chapter VII liquidation, and a trustee was appointed.

The Trustee proposed sale or abandonment of property held by Quanta in Long Island City, New York. Notice was given by the Clerk of the Bankruptcy Court. In response to objections by purported lienholders, a judgment was entered establishing the validity of a lien in the amount of $344,464. No one appeared at the public auction. An offer to purchase the property which was approved by the court was subsequently withdrawn with court approval when the purchaser discovered that hazardous wastes were located at the site.

A second notice was given when the Trustee declared his intention to abandon the property as burdensome to the bankrupt estate. In response to this notice, the State and City of New York objected. They urged that the trustee not be permitted to abandon the property, and that whatever assets existed in the estate should be used to remove the toxic waste from the property. They con-

tended abandonment of the property would violate federal, state and local laws concerning disposal of hazardous waste.

Over these objections, the court ruled that abandonment was permissible under section 554 of the Bankruptcy Code, 11 U.S.C. Sec. 554. The court ruled that the assets in the estate would be distributed to creditors and not be used for purposes of removing the toxic waste. The State and City have since that time expended $2.5 million to remove the toxic waste. They appeal from the Order of the Bankruptcy Court permitting abandonment and seek to have the $2.5 million to remove the toxic waste. They appeal from the Order of the Bankruptcy Court permitting abandonment and seek to have the $2.5 million cost of the cleanup borne by the bankrupt estate.

Section 554(a) of the Bankruptcy Code provides:

> Sec. 554. Abandonment of property of the estate. (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

The parties cannot dispute that the property is burdensome to the estate. Irrespective of the cleanup costs, the liens on the property exceeded the estimated force sale value of the property. Thus, the Trustee was otherwise justified, and by law was required, to seek to abondon the property.

The precise question here is whether abandonment must be denied under 11 U.S.C. Sec. 554 where the abandonment would violate public interest and/or federal, state and local laws. Cases cited by appellants have recog-

nized that abondonment could be denied where the effect of abandonment would be to threaten the public health and safety and/or to violate federal law. See, e.g., Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952); In Re Lewis Jones, Inc., 1 B.C.D. 277 (BK. Ct. E.D. Pa. 1974).

In Ottenheimer, the court refused to permit the Trustee to abandon barges because the inevitable sinking of the abandon barges would violate federal law forbidding the obstruction of navigable waterways. The court ordered that the assets of the bankrupt estate be used to remove the barges from the waterway before distribution of assets to creditors. In Lewis Jones, the court refused to permit abondonment of underground utility lines because the untended lines would pose a hazard to health and safety. The court ordered that assets of the estate be used to seal the lines and cement manhole covers before distribution to creditors.

Both Ottenheimer and Lewis Jones were decided before enactment of the Bankruptcy Reform Act of 1978. Therefore, there was no express statutory provision providing for the abandonment of burdensome property. The Lewis Jones court relied, in part, upon section 77(c)(6) of the former Bankruptcy Act, concerning reorganization of railroads, which allowed abandonment only where the public interest would not be harmed thereby. Lewis Jones, supra, 1 B.C.D. at 280. The Ottenheimer court expressed concern that permitting abandonment would subject the trustee or bankrupt to criminal penalties for having obstructed the waterways. Ottenheimer, supra, 198 F.2d at 290. As one commentator has remarked:

> If one of the purposes of the Bankruptcy Act is the rehabilitation of the debtor . . . it seems in-

> consistent to expose him to a criminal proceeding. It may well be that the Trustee himself would be liable for the obstruction of the channel if the barges sink . . . or that he would at least be subject to the penalty for aiding and abetting a violation of the statute by turning the barges over to the bankrupt knowing that they cannot be cared for properly. It would indeed be anamolous for one court to order its officer to do what another could punish as a misdemeanor.

Note, 66 Harv. L. Rev. 921, 922 (1953).

Although the question is a close one, this court concludes the ruling of the Bankruptcy Court must be affirmed. First, both Ottenheimer and Lewis Jones acknowledged that the rules concerning abandonment were judge-made rules which should yield to federal statutes and the general public interest. See, Ottenheimer, supra, 198 F.2d at 290; Lewis Jones, supra, 1 B.C.D. at 280. As the court wrote in Ottenheimer:

> It seems obvious to us that a rule which is not provided by statute but built up by court decisions to facilitate the administration and distribution of assets of a bankrupt estate should not be extended so as to reach such an unreasonable and unjust result. The judge-made rule must give way when it comes into conflict with a statute enacted to ensure the safety of navigation.

Id. at 290.

By contrast, section 554 of the Bankruptcy Code, 11 U.S.C. Sec. 554, constitutes an express statutory provision for the abandonment of burdensome property.

Nowhere is the power to abandon conditioned upon a finding that abondonment does not harm the public interest or violate any statutes. If Congress had intended to place this limitation on the power to abandon, it could have easily done so. Furthermore, as the Lewis Jones court recognized:

> The Supreme Court, in the case of Securities and Exchange Commission vs. United States Realty and Improvement Company, 310 U.S. 434, said that "a bankruptcy court is a court of equity and is guided by equitable doctrines and principles, except as they are inconsistent with the Act. . . ."

Lewis Jones, supra, 1 B.C.D. at 280 (emphasis added). Here, for the Bankruptcy Court to have granted the equitable relief requested and to have compelled that the assets of the bankrupt estate be used to remove the toxic waste would have been inconsistent with section 554 of the Act.

The Bankruptcy Court here ruled:

> The City and State are in a better position in every respect than either the trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility. But it is not the estate or the debtor's creditors who should finance the requisite cleanup, given the decision of the Trustee to abandon the property.

Transcript of June 22, 1982 Proceedings at 6. The City and the State have failed to demonstrate why the Bankruptcy Court was wrong in deciding that the creditors should not have to pay for the cleanup. The creditors are

not more responsible for the toxic conditions than the general public. And herein lies another problem with compelling that the assets of the estate be used to finance the cleanup.

As noted by the appellants and the Lewis Jones court, abondonment of railroad lines pursuant to the former Act was subject to the requirement that abandonment not violate the public interest. See 11 U.S.C. Sec. 1170(a). However, the legislative history to section 1170 includes the following:

> Subsection (a) permits the court to authorize the abondonment of a railroad line if the abondonment is consistent with the public interest and either in the best interest of the estate or essential to the formulation of a plan . . . The authority to abandon lines of railroad is, of course, subject to the Fifth Amendment to the Constitution, which may in particular cases require abandonment in order not to erode a secured creditor's interest in the debtor's property even though the public interest dictates otherwise.

House Rep. No. 85-595, 95th Cong., 1st Sess. at 423 (1977). This concern was also voiced in In Re New York, New Haven and Hartford Railroad Co., 330 F. Supp. 131, 147 (D. Conn. 1971) where the court wrote:

> The public interest cannot demand the erosion of the bankrupt's assets to the point of confiscating practically the entire asset. At some point, the extent and degree of taking runs into the constitutional prohibition to the Fifth Amendment, the taking of private property for a public use without just compensation.

Here, there is a serious question whether requiring that the estate's assets be used to pay for the cleanup—which would leave nothing for secured creditors—would constitute a taking without just compensation.

Finally, as noted by the Bankruptcy Court, Transcript, supra, at 7, to have refused to permit abandonment would have been "an exercise in futility." Abandonment of the property causes title to vest in the bankrupt who, concededly, does not have sufficient assets to pay for the cleanup. Refusing to permit abandonment would cause the title to remain in the Trustee. But the State and City do not dispute that the Trustee did not, does not, and never will have sufficient assets to finance the cleanup. The Bankruptcy Court expressly weighed this factor in its consideration of the public interest. Id. The court correctly concluded that the public interest would be best served by an expeditious cleanup and that permitting abandonment would result in a quicker cleanup than requiring the Trustee to retain title.

Appellant argued that section 959(b) of the United States Judicial Code, 28 U.S.C. Sec. 959(b), proscribes abandonment. Section 959(b) provides that the Trustee shall "manage and operate" property in his possession according to valid laws However, appellants are unable to cite a case which applied this requirement in a Chapter VII context. According to Professor Moore:

> Sec. 959(b) applies to the Receiver in his operation of property in his possession. It does not apply to the distribution of the estate, and does not require the Federal Receivership Court to comply with state laws regulating distribution of funds in the receivership.

Appendix G

2 Moore's Federal Practice Sec. 66.04(4). For instance, in State of Mo. v. U.S. Bankruptcy Court, 647 F.2d 768, 778 (8th Cir. 1971), the court remarked that a Trustee would not be required to obtain a state license necessary to operate grain warehousing if the Trustee wished to sell grain pursuant to a liquidation of the estate. I find that section 959(b) does not apply to abandonment in a Chapter VII proceeding.

Similarly, the attempted analogy to exception from the automatic stay provisions in cases involving enforcement of state police powers, 11 U.S.C. Sec. 362, is unpersuasive. This is because section 554 does not provide a similar exception to abandonment where the state is seeking to enforce police powers. Furthermore, section 362(a) expressly provides that the exception shall not apply where the governmental unit is pursuing a claim against the property of the debtor. Therefore, reliance of section 362 actually undercuts appellant's argument, inasmuch as the City and State are pursuing a claim against the debtor's property.

The decision of the Bankruptcy Court is affirmed.

APPENDIX H

Order of the United States District Court for the District of New Jersey

(Filed—January 25, 1983)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

(B. 81-5967)

Civil No. 82-3524

IN THE MATTER OF

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

Debtor.

THE STATE OF NEW YORK and the CITY OF NEW YORK,

Appellants,

v.

THOMAS J. O'NEILL, Trustee in Bankruptcy of Quanta Resources Corp., Debtor,

Appellee.

Appendix H

This matter having come before the court on an appeal from a decision of the Bankruptcy Court, and a hearing having been held and submissions from the parties having been considered;

IT IS on this 25 day of January, 1983, ORDERED that the decision of the Bankruptcy Court is affirmed, in accordance with a Memorandum Opinion filed with the clerk of the court this date.

FREDERICK B. LACEY
United States District Judge

Appendix H

Docket Entry

CAMDEN - NEWARK - TRENTON
08101 - 07102 - 08605

NEWARK, N. J.

CIVIL NO. 82-3524

IN THE MATTER OF

Quanta Resources Corp., debtor

The State of New York, et al

vs.

Thomas J. O'Neill

There was entered on the docket on 1-26-83 order affirming decision of Bankruptcy court.

ALLYN Z. LITE
CLERK

APPENDIX I

Order Authorizing Abandonment of Property of the United States Bankruptcy Court for the District of New Jersey

(Filed—May 20, 1983)

NOLAN, O'NEILL & MOORE
60 Park Place
Newark, New Jersey 07102
(201) 643-6300
Attorneys for Thomas J. O'Neill, Trustee

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW JERSEY

Case No. 81-05967

IN RE:

QUANTA RESOURCES CORPORATION,
a corporation of the State of Delaware,

Debtor.

ORDER AUTHORIZING ABANDONMENT OF PROPERTY

This matter having been opened to the Court by Nolan, O'Neill & Moore, attorneys for Thomas J. O'Neilll, Trustee in Bankruptcy of Quanta Resources Corp., debtor, upon a

Appendix I

Notice to Creditors of Proposed Abandonment dated April 23, 1983, and notice having been given to the debtor, its creditors, and other parties in interest of the Trustee's proposed abandonment of the property and of the opportunity to object and request a hearing on such proposed abandonment, and an objection having been filed by the State of New Jersey, Department of Environmental Protection, and the matter coming on to be heard before the Court on May 17, 1983, William F. McEnroe, Esq. of Nolan, O'Neill & Moore, appearing on behalf of the Trustee, Richard F. Engel, Deputy Attorney General, appearing on behalf of the Department of Environmental Protection, and Richard B. Honig, Esq. of Klinger, Honig, Redish & Klinger, appearing on behalf of the landlords, Frola and VonDohlin, and the Court having heard and considered argument of counsel and for good cause shown;

IT IS on this 20th day of May, 1983;

ORDERED that Thomas J. O'Neill, Trustee, be and he is hereby auhtorized to abandon the contents of the tanks located on the premises located at 1 River Road, Edgewater, New Jersey, consisting of mixed industrial and automotive oil, sludge and water, together with any other personal property of the debtor corporation located on said premises and also including any leasehold interest of the Trustee in the premises but reserving to the Trustee possession of that oil which is the subject matter of a sale to Valley Forge Engineering Inc. which oil shall remain in the possession of the Trustee pending completion of the sale, and it is

FURTHER ORDERED that entry of this Order shall be deemed to constitute the abandonment of the aforesaid property by the Trustee effective May 17, 1983, *nunc pro tunc.*

D. JOSEPH DEVITO
United States Bankruptcy Judge

APPENDIX J

Order Authorizing Abandonment of Property of the United States Bankruptcy Court for the District of New Jersey

(Filed—July 7, 1982)

NOLAN, BELL & MOORE
60 Park Place
Newark, New Jersey 07102
Attorneys for Thomas J. O'Neill, Trustee
(201) 643-6300

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEW JERSEY

Case No. 81-05967

IN THE MATTER OF

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

Debtor.

ORDER AUTHORIZING ABANDONMENT OF PROPERTY

This matter having been opened to the Court by Nolan, Bell & Moore, attorneys for Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor, upon

a Notice to Creditors of sale or abandonment of property dated March 18, 1982, and a Notice of Proposed Abandonment dated May 25, 1982, both notices relating to the real and personal property of the debtor corporation located at 37-80 Review Avenue, Long Island City, New York, and notice having been given to the debtor, its creditors and other parties in interest of the Trustees' proposed abandonment of the property and of the opportunity to object and request a hearing on such proposed abandonment, and objections having been filed by the State of New York and by the City of New York, and the matter coming on to be heard before the Court on June 8, 1982, and June 22, 1982, William F. McEnroe, Esq. of Nolan, Bell & Moore appearing on behalf of the Trustee, Norman Spiegel, Esq. and Nancy Stearns, Esq., assistant attorneys generals appearing on behalf of the State of New York, and Gary R. Tarnoff, Esq., assistant corporation counsel, appearing on behalf of the City of New York, and the Court having announced its decision in an oral opinion on June 22, 1982, the terms of which are incorporated herein, and for good cause shown;

IT IS on this 7th day of July, 1982

ORDERED that Thomas J. ONeill, Trustee, be and he is hereby authorized to abandon the real and personal property of the debtor corporation located at 37-80 Review Avenue, Long Island City, New York, and, it is;

FURTHER ORDERED that entry of this Order shall be deemed to constitute the abandonment of said property by the Trustee, effective June 22, 1982, *nunc pro tunc*, and it is;

FURTHER ORDERED that the application by the State of New York to declare a first lien on the subject property

in favor of the State of New York for any moneys expended by the State or City of New York to bring the facility into compliance with New York law and legally dispose of the wastes be and the same is hereby denied.

D. Joseph DeVito
United States Bankruptcy Judge

APPENDIX K

Oral Decision of the United States Bankruptcy Court for the District of New Jersey

UNITED STATES BANKRUPTCY COURT

For the District of New Jersey

Case No. 81-05967

In the Matter of

QUANTA RESOURCES,

Debtor.

TRANSCRIPT OF PROCEEDINGS

BEFORE:

THE HONORABLE D. JOSEPH DE VITO, United States Bankruptcy Court Judge, in Courtroom 6, Federal Courthouse and Post Office Building, Newark, New Jersey, on June 22, 1982, at 2:00 P.M.

1. Ajourned hearing objection to abandonment of Long Island City property by State of New York.

2. Adjourned hearing by trustee on objection to private sale to total recovery.

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APPEARANCES:

Messrs. Nolan, Bell & Moore
By: William McEnroe, Esq.
Attorney for Tim O'Neill, Esq., Trustee

Frederick A. O. Schwarz, Jr., Esq.
By: Gary R. Tarnoff, Esq.
Corporation Counsel of the City of New York

Nancy Stearns, Esq.
Norman Spiegel, Esq.
New York Department of Law

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Roseland, New Jersey 07068
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The Court: I have heard enough gentlemen. The Trustee in this matter has filed a Notice of Intention to abandon real and personal property located at 37-80 Review Avenue, Long Island City, New York, which property has been used for many years as a waste oil processing and storage facility improved with fuel storage tanks containing at present in excess of 500,000 gallons of waste oil and other chemicals of which at least 70,000 gallons of waste oil are contaminated with PCB's. It is undisputed that such equity as may exist in subject property over and above the amount of two mortgage liens would be rapidly dissipated by the costs of necessary and substantial repair and clean-up operations on the facility It appears to the Court, that there is little question if any that the subject

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property is burdensome to the estate and of inconsequential or no value to the estate.

The State of New York by its Attorney General, Robert Abrams, joined by the City of New York by its corporation counsel, F. Schwarz, objects to the proposed abandonment. The attorney general points out that to abandon such a facility would be an open invitation to vandals and arsonists. The destruction that they may cause together with the progressive physical deterioration of the facility makes it only a matter of time, the attorney general contends, before the toxic pollutants are discharged into the environment of New York City, threatening public health and safety. The attorney general cites 28 U.S.C. 959 (b), which provides "Except as provided in Section 1166 of Title 11, a Trustee, Receiver or manager appointed in any cause pending in any Court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such Trustee, Receiver or Manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

The attorney general requests that the Trustee not be permitted to abandon the Long Island City facility unless and until the Trustee removes all hazardous wastes from the facility and disposes of those wastes in accordance with New York State and Local Law.

Bankruptcy Code 554 (a), made applicable to liquidation cases under Chapter 7 by Bankruptcy Code 103 (a), permits the Trustee, after notice and a hearing, to abandon any property of the estate that is of inconsequential value or burdensome to the estate.

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Upon review of both the fair market and forced liquidation valuation of the facility, the attendant costs associated with its upkeep including twenty-four guard service for the property at a cost exceeding $1,100 per week paid by the Trustee, and the apparently gargantuan task of repair and clean-up, requiring a substantial expenditure, none of which data is materially controverted by the objecting parties, the Court agrees that, by any standard, the subject facility is of inconsequential value and burdensome to the estate.

This case or proceeding was originally filed as a Chapter 11 on October 6, 1981, was converted to a case under Chapter 7 on November 12th, 1981, and on November the 18th, 1981, Thomas O'Neill was appointed Trustee and continues to hold that office.

The violations of State and Local law complained of by the attorney general are not the doing of the Trustee, and the costs of repair of the physical premises and cure of the unquestioned hazardous waste conditions cannot be charged to the bankrupt estate.

It is the duty as well as the right of a Trustee or debtor in possession to seek the Court's approval to abandon property of inconsequential value or burdensome to the estate just as it is the right and duty of the Trustee or debtor in possession to seek the Court's approval for rejection of an executory contract when such contract is burdensome to the estate. And I refer to *in re*: *Investor's Development* 7 B.R. 772, at page 774 and 6 Bankruptcy Court decision, 1415 (Bankruptcy District of New Jersey 1980).

Section 959 of the Judicial Code is not controlling here. The costs of clean-up, maintenance and repair required

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to cure the hazardous waste conditions apparently endemic in the property have been factored into the Trustee's calculations whether or not to abandon the property and the Trustee has elected through the power vested in him by Section 554 of the Code to abandon in order both to conserve the assets of and insure the orderly administration and liquidation of the bankrupt estate.

For this Court to grant the relief sought by the attorney general, the right of the Trustee to abandon property of the estate pursuant to Section 554 would be rendered a nullity, as the estate would be made to suffer the resultant costs of managing and operating the property notwithstanding the decision of the Trustee to abandon same.

The City and State of New York are the proper parties to safeguard the health and safety of their citizens. The duty of the Trustee is to serve as representative of the estate, and the duty of this Court is to protect the assets of the estate in custodia legis.

The City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility. But it is not the estate or debtor's creditors who should finance the requisite clean-up, given the decision of the Trustee to abandon the property.

Abandonment constitutes a divestiture on the part of the Trustee of all interests in property that were property of the estate. I refer to Collier on Bankruptcy Section 554.02 at 554-8. (15th Edition, 1982), causing possession to revest in the debtor or other party with a possessory interest in the abandoned property.

The Court will, accordingly approve the decision of the Trustee to abandon the property. The request of the attorney general for a first lien on the property so as to prevent an alleged unjust enrichment by the first and second mortgagees, is rejected as unauthorized by the Code.

In reaching the decision, the Court has been very cognizant, mindful and concerned for the public interest in this situation. But I think for this Court to grant the relief requested by the attorney general, would do little else than to put into play an exercise in futility. And would possibly delay the parties who could be chargeable with the clean-up of the property or who have other interest to permit them to move in. That should go forth as quickly as possible. And I think this determination will work in that direction.

Thank you very much.

Mr. Spiegel: May we have a stay of the abandonment so that we can appeal this determination?

The Court: Do you want to be heard Mr. McEnroe?

Mr. McEnroe: We would oppose any stay, anything that would require us to do anything. We have already terminated security. And as you said, it doesn't serve any purpose to stay it.

The Court: I don't know what purpose a stay would be really here where we are abandoning the property. It is going back to the defunct corporation and possibly to the mortgagees.

Mr. Spiegel: We don't know. I certainly don't know what action the defunct corporation might take on the mortgagees in this interval and to maintain this status quo and maintain the jurisdiction of the Court.

The Court: If you are requesting a stay pending an appeal, is that what you are requesting?

Mr. Spiegel: Yes.

The Court: I am afraid, that I must deny the stay. I don't think that that denial affects your interest in anyway.

Mr. Spiegel: Thank you your Honor.

The Court: I don't think there is going to be any movement in this property for some time. The automatic stay continues. There's been no support for the vacating of that stay either before this matter or now.

Thank you very much.

APPENDIX L

Constitutional Provisions and Relevant Statutes

Amendment V—Capital crimes; double jeopardy; self-incrimination; due process; just comsation for property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Article VI—Debts validated. Supreme law of land.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and

all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

28 U.S.C.

§ 959. Trustees and receivers suable; management; State laws.

[*See main volume for text of* (*a*)]

(b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

(As amended Nov. 6, 1978, Pub.L. 95-598, Title II § 235, 92 Stat. 2667.)

Section 362 (11 U.S.C. § 362)

§ 362 Automatic stay.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), does not operate as a stay—

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

Section 554 (11 U.S.C. § 554)

§ 554 Abandoment of property of the estate.

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

Section 704 (11 U.S.C. § 704)

§ 704 Duties of trustee. The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close up such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) investigate the financial affairs of the debtor;

(4) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(5) if advisable, oppose the discharge of the debtor;

(6) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(7) if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court requires; and

(8) make a final report and file a final account of the administration of the estate with the court.